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Supreme Court, U.S.
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No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1996

Joseph P. Boltach, Petitioner
v
Dexter Township, Respondent

Abraham V. Williams, Jr., Petitioner
v
Dexter Township, Respondent

On Petition for a Writ of Certiorari to the
Michigan Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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August, 1996

14 pp

Questions Presented

Does a state deprive citizens of their Fourteenth Amendment right to due process when its courts affirm a local government act after repeatedly refusing citizen requests to determine whether the local government act is or is not unconstitutional under several clauses of both federal and state constitutions?

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Joseph P. Boltach and Abraham V. Williams Jr. respectfully petition for a writ of certiorari to review the judgment of the Michigan Court of Appeals in this case.

Opinions Below

None of the opinions entered below have been published.

Jurisdiction

The Michigan Court of Appeals entered its judgment on March 10, 1995. The Michigan Supreme Court denied leave to appeal on March 29, 1996 and denied Petitioners' motion for reconsideration on June 18, 1996.

The jurisdiction of this court is invoked under US Const, art III §§ 1, 2 and 28 USC § 1257(a).

Constitutional And Statutory Provisions Involved

United States Constitution

ARTICLE VI SECTION 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

ARTICLE VI SECTION 3

... all executive and judicial Officers .. of the several States, shall be bound by Oath or Affirmation, to support this Constitution...

AMENDMENT XIV

... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT V

No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Michigan Constitution

Article 6 § 28

All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review **shall** include, **as a minimum**, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record. ... [Emphasis added].

Article 1 § 1

All political power is inherent in the people. Government is instituted for their equal benefit, security and protection.

Article 1 § 2

No person shall be denied the Equal Protection of the laws; ...

Article 1 § 17

No person shall ... be deprived of life, liberty or property, without due process of law. ...

Article 10 § 2

Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law. ...

Michigan Statues

MCL § 205.735

A proceeding before the tribunal shall be original and independent and shall be considered de novo. ...

MCL § 205.753(1)

Subject to section 28 of article VI of the state constitution of 1963, ... an appeal from the tribunal's decision shall be by right to the court of appeals.

Statement Of The Case

The Principle Case

Owners of 18 properties filed petitions in the Michigan Tax Tribunal challenging the constitutionality and statutory authority of Dexter Township's Special Assessment Resolution Number 3. Petitioners claimed, among other things, that the assessment resolution violated federal and state constitutional guarantees of due process and just compensation. Petitioners' Appendix [PA], pp 22a - 35a.

During opening argument, Petitioners' attorney Joel Welber stated:

> "We are not challenging the statutory basis for the inclusion of these Petitioners under Public Act 145, as opposed to Public Act 233. And the technical arguments that we previously raised in our petition, are not being pursued at this point." PA p 36a.

That statement was intended to dispose of the technical issues raised in counts 1 though 3 of Petitioners' Amended Petition. Referring next to counts 4 through 6, Mr. Welber continued:

> "But we will prove a more important proposition. Specifically, that these Petitioners should not substantively be included in this sewer project under any statute.

"Petitioners contend, and we will prove, that there is no rational basis for the inclusion of these Petitioners in this sewer and that, at the time of the confirmation of the sewer assessment district, the Dexter Township Board of Trustees neither adopted nor employed any rational standard under which the Petitioners would be so included.

* * *

"Petitioners will further prove that they will receive no special benefit that is required to justify the assessment as a matter of law.

* * *

"Petitioners will further show that even within the assessment district, the benefits are improperly allocated for at least two reasons.

"The first reason, is that ... identifiable properties which will benefit disproportionately to other ... identifiable properties, are assessed at the same rate. And this is legally impermissible.

"Second, and more crucially, no portion of the cost of this project has been allocated to the general public, not withstanding a clear public benefit that will be repeatedly proven through the testimony." PA pp 39a - 36a.

After the close of 6 and a half days of hearings, written closing arguments were filed by both parties. Petitioners argued the points raised by counts four *through six, and discussed* the Equal Protection issue made evident thereby. PA pp 39a - 41a.

The Michigan Tax Tribunal hearing officer ruled that Michigan's common law prohibited him from reviewing the constitutionality of a special assessment until and unless Petitioners first proved a specific amount of economic harm:

> "This hearing officer also cites and considers herein the 4 to 3 Supreme Court decision in **Dixon Road Group** v **City of Novi**, 426 Mich 390; 395 NW2d 211 (1986) wherein the majority recognized that:
>
> > "decisions made by municipalities with respect to special assessments generally should be upheld. This court will intervene where there is a substantial or unreasonable disproportionality between the amount assessed and the value which accrues to the land as a result of the improvement. The cost of the improvements is approximately 2.6 times the increase in the value of the properties. **Dixon**, **supra**, page 403." PA p 12a.

The hearing officer's findings of fact do not include a determination of any petitioners' burden. PA pp 4a - 9a. The hearing officer's findings of fact do not include a determination of any petitioners' benefit. Id. The hearing officer's findings of fact do not include a determination of the amount by which the burden exceeds the benefit for any petitioner. Id. Instead, under "Conclusions of Law", the hearing officer wrote:

> "Special assessment determinations are peculiarly legislative in nature and within the purview of local authorities, absent fraud, mistake or abuse of discretion (such that produces a disproportionate result per **Dixon**, **supra**) none of which appear in the facts of this case. Therefore, having determined petitioners' properties were specially benefited and that no fraud, mistake or abuse of discretion that adversely affected any of the petitioners herein, it is concluded that the special assessments herein should be affirmed. PA p 16a. (Parenthetical comment in the original).

Both sides filed objections to the hearing officer's proposed judgment. Petitioners reasserted their unanswered constitutional claims. Petitioners also argued that the hearing officer applied an incorrect standard of review and changed the burden of proof after the hearing. PA p 42a

A three member Michigan Tax Tribunal panel incorporated the hearing officer's proposed judgment as its final judgment without opinion or other comment. PA p 3a.

The Appellate Case

Petitioner's timely filed a claim of appeal, realleging the unanswered claims of federal and state constitutional error and the Michigan Tax Tribunal's use of an incorrect standard of review and incorrect burden of proof. PA pp 43a - 44a.

Dexter Township moved to summarily affirm the special assessment based on the Michigan Supreme Court's decision in **Kadzban** v **Grandville**, 442 Mich 495; 502 NW2d 299 (1993), to uphold the use of a presumption of validity in special assessment cases. PA p 45a. The Michigan Court of appeals denied the motion:

> "for failure to persuade the Court that it is manifest that the questions to be reviewed are so unsubstantial as to need no argument or formal submission or were not properly raised." PA p 18a.

Nevertheless, a different panel of the Michigan Court of Appeals later affirmed the special assessment, ruling:

> "We hold that the constitutional issues raised on appeal by petitioners were abandoned below." PA pp 1a -2a.

The court's sole offer of justification for the finding was:

> "In the Tax Tribunal, petitioners affirmatively announced that they would not pursue 'the technical [constitutional] arguments' raised in their petition." Id.

Petitioner's moved for rehearing, asserting that they did not abandon any constitutional issues and that they have a constitutional right to a review of the issues in any event. PA p 46a.

On May 30, 1995 the Michigan Court of Appeals denied the motion for rehearing without comment or opinion. PA p 19a.

Petitioner's application for leave to appeal to the Michigan Supreme Court was denied without comment or opinion on March 29, 1996. PA pp 47a, 20a.

Petitioner's motion for reconsideration was denied on June 18, 1996. PA pp 48a, 21a.

Reasons Why The Petition Should Be Granted

This case has reached the United States Supreme Court because the Michigan Courts have refused to decide whether or not Respondent's special assessment conforms to the fundamental requirements of fairness found in both the federal and Michigan constitutions. The decision to not answer the

question of whether or not the special assessment at issue is unconstitutional is clearly erroneous.

> "This Constitution, and the Laws of the *United States which shall be made in* Pursuance thereof; ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding".
>
> ... all executive and judicial Officers .. of the several States, shall be bound by Oath or Affirmation, to support this Constitution... US Const, art VI, §§ 2 - 3.

These constitutional mandates preclude the possibility of having an adequate and independent state law ground for affirming an unconstitutional local government act. **Daniels** v **Williams**, 474 US 327, 331 (1986), **Sioux City Bridge Co** v **Dakota Cty**, 260 US 666; 43 SCt 190; 67 LEd 340 (1923), **Marbury** v **Madison**, 5 US (1 Cranch) 137; 2 LEd 60 (1803). They also show us that such a failure is not a mere legal error, but a serious offense:

> "Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument." Id.

Michigan used to ascribe to these principles as well:

> "That this is 'merely' a tax [case] and not one of freedom of speech, or worship, is immaterial. There are no differences in degrees of protection afforded in the constitutional safeguards. With equal alacrity we halt in [their] tracks, once [their] foot crosses the line, the inquisitor, the police[officer], the tax collector, the legislature, or the executive. Our question is not how far [they have] passed over the forbidden line, how serious [their] encroachment, or how aggravated the arrogance. Our duty arises with the trespass itself." **Alan** v **Wayne Cty**, 388 Mich 210; 200 NW2d 628, 675, 676 (1972), quoting **Lockwood** v **Comn'r of Revenue**, 357 Mich 517, 558; 98 NW2d 753, 760 (1959).

Even in the same year the Michigan Supreme Court decided the **Dixon** case, it also affirmed the basic law:

> "Although ***Sioux City*** is factually dissimilar to the instant cases, the broader proposition for which it stands is clearly apposite. When faced, as in this case, with a choice between securing that which is due under the law and upholding the constitutional requirements of

> uniformity and equality, the latter is to be preferred 'as the just and ultimate purpose of the law.'" **Armco Steel Corporation** v **Dept of Treasury**, 419 Mich 582; 358 NW2d 839, 844 (1984), quoting and paraphrasing **Sioux City Bridge** at US 446-447.

At least until 1984, Michigan was in accord with the People of the United States in believing that the most important function to be served by the Michigan judicial system was to protect its citizens from the well intended but nevertheless overreaching acts of government.

However, in 1992, the Michigan Tax Tribunal determined that Michigan common law prevented it from determining whether or not the special assessment at issue violated the constitution as alleged. The case cited, **Dixon Road Group** v **City of Novi**, 426 Mich 390, 403; 395 NW2d 211 (1986), clearly does require a tribunal hearing officer to begin with a bias rather than to perform an original and independent review of the issues considered de novo as the Michigan Tax Tribunal act requires. **Dixon**, at 403, MCL 205.735.

Dixon did not discuss the statute's standard of review nor its impact upon an old common law presumption applied to cases tried in equity. **Dixon** did not discuss whether all constitutional errors were to be ignored, or if it was only minor dollar value

differences in a takings analysis that it would not "trifle" with.

When the Michigan Tax Tribunal adopted the hearing officer's proposed judgment without so much as a word about **Dixon**, MCL 205.735 nor Const 1963, art 6, § 28, the duty fell upon the Michigan Court of Appeals on an appeal of right. PA pp 1a - 2a, MCL 205.753(a), Const 1963, art 6 § 28.

The Michigan Supreme Court revisited the presumption of validity question in the context of special assessments about one year after the Michigan Tax Tribunal hearing officer relied on **Dixon**. In **Kadzban** v **Grandville**, 442 Mich 495, 502, 505; 502 NW2d 299 (1993), the court said "special assessments are to be presumed valid". However, the statutory and constitutional standard of review was not discussed. It should be noted that the Michigan Supreme Court did hold that:

> "Of course, the question whether and how much the value of land has increased as the result of certain improvements is factual, to be determined on the basis of evidence presented by the parties." **Kadzban**, p 502.

And further, that

> "Of course, after plaintiffs present evidence effectively rebutting the presumption of validity, the burden of going forward with evidence shifts to the city. [Cf omitted]. At that point, the city must, under

> Dixon Road, present evidence proving that the assessments are reasonably proportionate in order to sustain the assessments." **Kadzban**, p 505 n 5.

Throughout the case, the focus was only upon Petitioners' 5th amendment takings claim.

Respondent asked the Michigan Court of Appeals to summarily affirm based on the **Kadzban** case. PA p 45a. The Michigan Court of Appeals declined, as stated above. PA p 18a.

A different Michigan Court of Appeals panel subsequently affirmed the Michigan Tax Tribunal. PA pp 1a - 2a. The Michigan Court of Appeals did not answer the questions the previous panel implied it should, including whether or not to rely on **Dixon**, and **Kadzban** when Const 1963, art 6 § 28 requires a review that

> "shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record." PA pp 1a - 2a.

There is no question that this constitutional provision is applicable in this case since the Michigan Tax Tribunal act says:

> "Subject to section 28 of article VI of the state constitution of 1963, ... an appeal from the tribunal's decision shall be **by right** to the court of appeals. MCL 205.753(1). Emphasis added.

Instead of taking any act that may have shown even a small amount of respect for its duty to protect Petitioners' rights, the Michigan Court of Appeals first said:

> "We hold that the constitutional issues raised on appeal by petitioners were abandoned below. In the Tax Tribunal, petitioners affirmatively announced that they would not pursue 'the technical [constitutional] arguments' raised in their petition." PA pp 1a.

We can be absolutely certain that the Dixon v constitution and statute issue was not waived during petitioners' opening statement for the obvious reason that the issue did not exist until months later. The Michigan Court of Appeals simply ignored the issue and its duty to resolve it.

There is only one way the court could have honestly misunderstood the sentence fragment it

quoted out of context. That way would be to have not read the whole opening argument. The very next words to follow the sentence the Michigan Court of Appeals misinterpreted says:

> "But we will prove a more important proposition. ...
>
> "Petitioners contend, and we will prove, that the ... Dexter Township Board of Trustees neither adopted nor employed any rational standard ...." PA p 36a.

Such a claim easily explains the relevance and admissibility of questions asked of Respondent's Board Supervisor Jim Drolett and his replies:

> Q: ... [W]hat standards did you, yourself, employ, in working with McNamee Porter and Seeley?
>
> A: ... I used what appeared to be logical boundaries ... Trial Transcript, pp 512 - 513.

This was not an isolated question. Petitioners asked all but one of Respondent's board members whether or not a standard was developed.

> Q: So, do you remember yourself, participating in a process of designing specifications or instructions for these parties to use?
>
> A: No. Treasurer, TT p 950.

Also,

Q: There was no guidelines prepared, no directives, isn't that correct?

A: I don't believe there were any written directives or anything like that. Clerk, TT p 1156.

One trustee mentioned that vacant lots would receive a sewer tap, TT p 1232. Petitioners forgot to present the question to one trustee. The standards issue was presented far more extensively than these quotes suggest. However, Petitioners are not asking the United State Supreme Court to decide a simple question of fact. These samples are designed only to show that anybody who reads the trial transcript will know that whether or not standards were developed was at issue during the hearing.

Consequently, if the Michigan Court of Appeals holding of abandonment was honest in fact, then it is certain that the panel was unaware of Petitioners' whole opening statement and the rest of the trial transcript's contents. To be that unaware, the Michigan Court of Appeals would have had to abandon Petitioners' claims of error **before** deciding whether or not Petitioners did.

The Michigan Court of Appeals follows its claim of "abandonment" with:

> "We are not convinced that a miscarriage of justice would occur were we not to rule upon these unpreserved issues. [state cites omitted]." PA p 1a.

As a matter of law, the truth of that statement depends on whether or not the special assessment at issue is or is not unconstitutional, since it is well established above that a miscarriage of justice is inherent in every unconstitutional local government act. US Const, art VI, § 2. **Marbury**. That is why the people ordered state court judges to take an oath to strike down unconstitutional laws. US Const, art VI, § 3.

Either the Dexter Township Board did or did not develop standards. Either the Dexter Township Board did or did not place the burden for a public improvement upon the shoulders of a small percentage of the people who receive the benefit. Either the Dexter Township Board's flat rate special assessment does or does not vary from property to property in some reasonable relationship to the way the individual property values will rise or fall as a result of the improvement.

If the Court of Appeals had an honest interest in whether or not a miscarriage of justice would occur, there was one excellent way to find out. All the court needed to do was compare the evidence to the law. There are sixteen hundred pages of transcript and 40 some exhibits to guide an independent trier of fact. There are nearly a dozen of briefs in the record. All that is needed now is what has been needed since May, 1989: an original, independent review of

Petitioners' specific claims of error considered de novo, having due regard of the evidence of actual fact. Instead, the Michigan Court of Appeals went to extremes to avoid that task.

Whether the requested review should be performed solely because it is the right thing to do, or should be performed because Petitioners have several constitutionally protected rights to the review, or should be performed because the Michigan Court of Appeals needs to know whether or not a substantial miscarriage of justice will occur, the review still should be performed. As it stands now, neither party has a court order resolving any of Petitioners' long standing claims of error. Therefore, unless Respondent makes no effort to enforce its unconstitutional assessment, this case will remain open, perhaps with a different caption, until the issues are reviewed. Both sides need an order that at least looks like an honest effort to answer each one of Petitioners' claim of error. Once that job is done, this case will probably be as good as closed.

Further more, there are indications that the special assessment at issue in this case has been "at issue" for as long as it has because Michigan may no longer believe that it is duty bound in special assessment cases to "halt in their tracks" government officials who cross the line. The Michigan Supreme

Court has ordered the Michigan Tax Tribunal to begin with an unconstitutional, pro-validity bias in the two recent cases of **Dixon** and **Kadzban**. The Michigan Tax Tribunal carried that presumption of validity to an issue-precluding extreme. The Michigan Court of Appeals went to great lengths to avoid having to learn whether or not the underlying special assessment is void. The Michigan Supreme Court did nothing when faced with the opportunity to perform an extremely important governmental duty. Each of those decisions were made not withstanding their violation of both the spirit and the letter of fundamental constitutional law. Each of these actions result in the continued existence of a special assessment resolution that cannot possibly survive the least intense constitutionally required scrutiny, even if the review begins with a presumption of validity.

Conclusion

Therefore, Petitioners ask this honorable court to grant this petition for a writ of certiorari and to exercise its Article III power to take any other action it deems necessary and proper to ensure, as a minimum, that Petitioners' claims of error are ultimately reviewed as due process requires, and to ensure that Michigan and other states accept and execute their duty to review future special assessments.

Respectfully Submitted,

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State Of Michigan
Court Of Appeals

UNPUBLISHED
MARCH 10, 1995

JOSEPH BOLTACH,
ANITA BOLTACH,
and ABRAHAM V WILLIAMS, JR., et. al.
Petitioners-Appellants,

v

DEXTER TOWNSHIP,
Respondent-Appellee.

Docket Numbers

155781 & 156507

Before: Taylor, P.J., and Griffin,
and W.G. Schma[1], JJ.

MEMORANDUM.

Petitioners appeal as of right an order of the Tax Tribunal affirming a special assessment adopted by respondent township. We affirm.

We hold that the constitutional issues raised on appeal by petitioners were abandoned below. in the Tax Tribunal, petitioners affirmatively announced that they would not pursue "the technical [constitutional] arguments" raised in their petition. We are not convinced that a miscarriage of justice would occur were we not to rule upon these unpreserved issues.

---

[1] Circuit judge, sitting on the Court of Appeals by assignment.

People v Evola, 202 Mich App 178, 180; 507 NW2d 815 (1993), lv den 445 Mich 931 (1994); Petrus v Dickinson Co Bd of Comm'r, 184 Mich App 282, 288; 457 NW2d 359; lv den 435 Mich 879 (1990).

As to the factual findings made by the tribunal, we find such findings supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6 § 28 and Meadowlanes Limited Dividend Housing Ass'n v Holland, 437 Mich 473, 482; 473 NW2d 636 (1991). We therefore affirm.

Affirmed.

/s/ Clifford W. Taylor
/s/ Richard Allen Griffin
/s/ William G. Schma

State Of Michigan
Michigan Tax Tribunal

Laurence Baughn, et al.
Petitioner

v

Dexter Township
Respondent

Docket Numbers

124693 through 123709

Opinion And Judgment

Tribunal Judge Present
Thomas J. Hughes

This matter having come on before Hearing Officer James R. Neumann, and a Proposed Judgment having been issued on June 5, 1992, from which exceptions and written arguments thereto were filed, and

The Tribunal, pursuant to Section 26 of the Tax Tribunal Act, as amended by 1980 PA 437, having considered all matters raised and being fully familiar in the premises, does hereby adopt and incorporate by reference the findings of fact and conclusions of law in the said Proposed Judgment as the final decision of the Tribunal.

No costs, a question of public importance.

MICHIGAN TAX TRIBUNAL

By /s/ Thomas J. Hughes

Entered: August 11, 1992

State Of Michigan
Michigan Tax Tribunal
June 5, 1992

Joseph P. and Anita Boltach,
Abraham V. Williams, Jr., et. al.
Petitioners — Docket Numbers
v
Dexter Township, 214693 through 124709
Respondent

Proposed Opinion And Judgment

Hearing Officer Presiding
James R. Neumann

Findings of Fact

These consolidated matters came on for hearing at 9:00 A.M. on May 29, 1991 in the Lansing, Michigan hearing rooms of the Tax Tribunal. The hearing continued for six days, through June 5, 1991, and was adjourned to permit petitioners and opportunity to obtain additional information regarding valuation. The hearing reconvened August 29, 1991 and concluded following new testimony of Appraiser Schuur. Arguments and briefs were filed during October and November, 1991.

Petitioners were represented by Joel S. Welber, attorney at law, and respondent was represented by Peter C. Flintoft, attorney at law. Between them, 17 witnesses were called to testify, as follows: (1) Barry Johnson, Director, Washtenaw County Environmental

Health Bureau; (2) Michael Morehouse, inspector, Washtenaw county Environmental Health Bureau; (3) Hendrik Schuur, appraiser with Gerald Alcock Co.; (4) James Drolett, township supervisor; (5) Robert Engel, home builder; (6) Lawrence Baughn, petitioner; (7) Abe Williams, petitioner; (8) Anita Boltach, petitioner; (9) Julie Knight, township treasurer and township trustee; (10) Earl Doletsky, township trustee; (11) Alison Bruno, petitioner; (12) Mary Ann Hitchcock, petitioner; (13) Nelson McCormick, petitioner; (14) William A. Eisenbeiser, township trustee; (15) Douglas Smith, township trustee; (16) Doris Breijak, petitioner; (17) Raymond J. Smit, engineer and CEO of McNamee, Porter and Seeley Engineering. Also petitioners introduced 31 exhibits and respondent introduced 13 exhibits, all of which are a part of the record in these matters.

These appeals involve special assessments levied by Dexter Township, Washtenaw County, for sanitary sewers in the area around and near Portage Lake. This total special assessment project includes Portage and Base Line Lakes in an intercounty district involving Webster and Dexter Township in Washtenaw County and Putnam and Hamburg Township in Livingston County.

The total project includes about 1100 existing residential units with about 200 additional units projected as beneficiaries of the sewer project. About 425 taps are allocated to Dexter Township (apparently actually 412 taps). The project includes the construction of a waste water treatment facility with permits providing for 240,000 gallons of discharge per

day. The assessment per sewer tap (benefit) is $7000 and each living unit within the district is required to have one tap. Therefore, each duplex would require two (2) taps. The $7000 per tap estimate was determined by dividing total estimated cost of $9 million by 1296 taps. Petitioner Boltach was assessed seven (7) taps (benefits), one single family residence and three duplexes at two benefits each. Seven (7) residences west of Dexter-Pinckney Road were removed from the assessment district by a vote of the township board and petitioners herein petitioned to be removed from the district but their removal was not approved by the township trustees.

The majority of the parcels in the district involve small lakefront lots, many of which currently are subject to Health Department (Bureau) water flow restrictions and some are in fact limited to seasonal use only. Generally, the lakefront properties' septic systems were no longer adequate and some properties faced what were described as "unsolvable septic problems" without the development of a sanitary sewer system.

All of the petitioners are off lake properties in the Portage Heights subdivision (hereafter PH Sub) except petitioners Boltach who own a farmhouse and duplexes on "outlots" adjoining the subdivision to the south. Apparently, all of the petitioners, except perhaps Boltach, have access to the lake via easements or other lots.

Health Department officials who testified indicated support for the project as a public health improvement and indicated a municipal or community sanitary sewer

system is always preferable to individual septic systems. State law requires sanitary sewer hookup if a sewer line comes within 200' of the property. See MCL 333.12751(a). The petitioners' properties are up gradient from Portage Lake but no clear evidence exists to show they are polluting the lake. However, some evidence does appear in the record indicating that there are some lakeshore properties that have or are polluting the lake.

Mr. Johnson of the Health Department observed from his experience that sanitary sewer installations around Whitmore Lake and Horse Shoe Lake in the county resulted generally in the lake water quality improving, improvement of the properties in the area by the fixing up of homes, more of which became full year residence and a general upgrading of area properties. Further, he indicated that the seven properties west of Dexter-Pinckney Road that were removed from the assessment district should not have been.

The petitioners who testified each indicated they did not believe their property values were being increased by being required to be a part of the Special Assessment District. They generally indicated they have good septic systems which they expect will operate efficiently for many years, and they have adequate area within their lots for the required additional "backup septic field" (as required by ordinance) should they experience a failure. Some of the petitioners indicated they would experience a loss as a result of being required to tap-in to the community sanitary sewer because of additional costs to tap-in and hookup and operating fees.

Mr. Hendrik Schuur, appraiser, did an analysis of single family residential sales and as a preliminary opinion based upon "mathematical means" opined that a "typical" PH Sub single family property would experience an increase in value equal to or greater than $7000 (see P-10). He limited his opinion by indicating an estimate of the exact value increase for a particular property would require a before-and-after appraisal and no such appraisal was done for single family homes in this case. Exhibits P-10A (Boltach Duplexes) and P-10B (Gaida Duplex) were introduced at the reconvention of the hearing on August 28, 1991 and involved before and after appraisals based upon the discounted cash flow income approach to value. Mr. Schuur opined a loss in value for the Boltach duplexes (three buildings - six units requiring six sewer benefits at $7000 each - currently non-conforming septic as only one system per duplex when each unit is required to have its own septic system) ranging from $18,000 to $30,000 (testimony indicated $27,000) depending upon certain assumptions regarding the costs to tap-in and whether or not the on-site septic system is a legally conforming or nonconforming use. The Gaida duplex was also valued using a discounted cash flow income approach and depending upon certain assumptions regarding "costs" to tap-in and conforming or nonconforming septic systems opined a lost in value ranging from $4000 to $5000. Testimony indicated an error was made in allocating tap and the Gaida duplex was assigned only one tap (benefit). The Gaida duplex involves a 1/2 acre lot and one septic filed for both units. The current ordinance dealing with septic systems requires a minimum of a one acre lot,

compliance with setback requirements from neighbors and lakes, etc., a septic drain field and alternate space for a backup drain field and at least 100 foot separation between well and drain field.

Engineer Raymond Smit explained that this sanitary sewer project was intended to serve existing dwellings in and around the lakes and that the township did not intend on expanding the sewer system to any new vacant areas for development. He indicated that as far as he knew PH Sub was a part of the assessment district from the beginning plans of the project and should be a part of the district and that the seven properties that were removed from the district should not have been removed. He opined a list of benefits to be associated with the installation of a public sewer system to include: (1) saving the need for space in building lot for septic drain fields (original and back-up); (2) waste water treatment assurance and peace of mind; (3) there is "value: in the public service system versus on site septic system; (4) community public health is improved and enhanced; (5) water quality of the lakes is improved and cleaned up; (6) reduces nutrients flowing into lakes - reducing eutrophication; (7) reduces potential health problems for swimmers. Generally his experience indicates after a few years of having a public sewer system the quality of the lake improves, property upkeep improves and is cleaned up and property values increase. A public or municipal sewer system in general is either provided or it is not within a geographic area of need. You do not hopscotch around within a district area. In other words, it is a community program or project for

all or none and individual property owners cannot opt to be in or out.

Conclusions of Law

The basic theory of special assessment as cited in **Fluckey** v **City of Plymouth**, 358 Mich 447; 100 NW2d 486 (1960) is set forth in **Cooley on Taxation** (3rd ed.), pp 1153 and 1154, as follows:

> The general levy of taxes is understood to exact contributions in return for the general benefits of government, and it promises nothing to the persons taxed, beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be specially and peculiarly benefited, in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and, in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the person receiving it.
>
> The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no

pecuniary loss thereby; their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay.
(Emphasis added.)

See, also, the discussions of the problem in **City of Detroit** v **Weil**, 180 Mich 593; 147 NW 550 (1914), **Powers** v **City of Grand Rapids**, 98 Mich 393; 57 NW 250 (1894), **Long** v City of Monroe, 265 Mich 425, 430 (dissenting opinion); 251 NW 582 (1933), and **New York Central R Co** v **City of Detroit**, 354 Mich 637; 93 NW2d 481 (1958).

It must be stressed that the facts before us do not involve a mere error in judgment on the part of assessing authorities. We do not trifle with such. Nor do they involve the substitution of the judgment of the court upon the worth of special benefits conferred.

The assessors, not the court, weigh the benefits, if, in truth, there are benefits to be weighed.

See also **Blades** v **Genesee County Drain District No 2**, 375 Mich 683; 135 NW2d 243 (1965) and **Brill** v **City of Grand Rapids**, 383 Mich 216; 174 NW2d 832 (1970).

Further, this hearing officer cites with approval those cases establishing the principle that special assessments are presumed to be valid, Konfal v Delhi Township, 91 Mich App 147, 283 NW2d 677 (1979); Production Tool Supply Co v City of Roseville, 74 Mich App 34, 253 NW2d 350 (1977). And whether there is no benefit, or the amount of benefit, is peculiarly a decision best made by the legislative body imposing the assessment. Courts should be reluctant to interfere in this legislative determination unless there is fraud, mistake, or abuse of discretion. **Power** v **City of Grand Rapids**, supra; **Frischkorn Investment Co** v **City of Detroit**, 257 Mich 546; 241 NW 903 (1932), **Graham** v **City of Saginaw**, 317 Mich 427; 27 NW2d 42 (1947).

This hearing officer also cites and considers herein the 4 to 3 Supreme Court decision in **Dixon Road Group** v **City of Novi**, 426 Mich 390; 395 NW2d 211 (1986) wherein the majority recognized that

> decisions made by municipalities with respect to special assessments generally should be upheld. This court will intervene where there is a substantial or unreasonable disproportionality between the amount assessed and the value which accrues to the land as a result of the improvement. The cost of the improvements is approximately 2.6 times the increase in the value of the properties. **Dixon**, **supra**, page 403.

This case involved road improvements, water mains and storm sewers and an assessment of $13,236.81

per acre or $264,736.16 for Novi land and $38,769.11 per acre or $765,302.33 for the Dixon Road land.

The basic test to be applied is as set forth in Soncoff v City of Inkster, 22 Mich App 358; 177 NW2d 243 (1970) when citing 63 CJS Municipal Corporations, sec. 1371, page 1128 as follows:

> That the existence of a special benefit necessary to allow a special assessment may be found where the improvement results in an increase in value, a relief from an existing burden, or the creation of a special adaptability in the land.

This language as cited in Soncoff is truncated and the court in Dixon refers to possible misinterpretation thereof and refers to the full sentence form CJS as follows at page 400 of **Dixon**:

> Property is specially benefited within the meaning of the law governing special assessments where the improvement would increase the value of the land, relieve it from a burden, or make it specially adaptable to a purpose which enhances its value, and where the assessment is fair, having regard to the value of realty benefited, and is proportioned to the property assessed, the assessment will be deemed proper. (Emphasis original.)

The issue to be decided on these facts is whether or not petitioners herein were specially benefited from the special assessment project as measured by an increase in the value of the property and that the increase is reasonably proportional to the cost assessed.

This hearing officer, upon due, careful and deliberate consideration of the testimony, exhibits, arguments and briefs of counsel concludes that petitioners were specially benefited by this sanitary sewer special assessment project and the value enhancement realized by petitioners is not unreasonably disproportionate to the cost.

A presumption of validity in the special assessment as approved by the local unit of government exists and the burden of refuting that presumption lies with petitioners. On these facts, petitioners owning single family residences have failed to provide evidence of the value estimates of their property before and after the sanitary sewer project, except for petitioners' statements at hearing that they didn't believe the value would increase as a result of the sewer project and some said the value might decrease. These statements were apparently not supported by an analysis of sales information or other sales data. Appraiser Schuur on behalf of respondent opined, based upon a sales analysis and averages, that the single family homes within the petitioner's group would experience an increase in value of at least $7000 each as a result of the sanitary sewer project. This analysis was supported by sales data but lacked any specificity as to any particular property. At the hearing Mr. Schuur was identified and recognized as an independent fee appraiser and that he was expressing an independent opinion based upon his analysis and it wouldn't make any difference who had hired him. Appraiser Schuur, post initial hearing, was engaged to do an analysis of value on the Boltach and Gaida

duplexes and exhibits P-10A and P-10B were admitted and his testimony was taken relative to his duplex value analysis. This hearing officer finds that relative to the duplex analysis Mr. Schuur did an incomplete appraisal in limiting himself to a discounted cash flow income approach. Case law and other references are clear:

> All three approaches should be used whenever possible, and an appraisal which disregards an approach by mere statement and without research justifying non-use is considered incomplete.

See the State Tax Commission Assessors Training Manual, ch VII, p 34l also The Appraisal of Real Estate, 9th ed, American Institute of Real Estate Appraisers, 1987, p 61-65; Meadowlanes LDHA v City of Holland, 437 Mich 473 (1991).

These authorities and relevant case law require that all three approaches - cost, income and market - be utilized in the valuation process. This hearing officer concludes that by limiting himself to the income approach appraiser Schuur did nothing more than an incomplete analysis resulting in showing that when you increase expenses (for the costs of the sanitary sewer) thereby reducing net income, when capitalized you will receive a result which indicates a lower valuation. It is a mathematical surety, no other answer is possible in this situation (expenses increased) when the process is limited to the income approach. This hearing officer specifically rejects Mr. Schuur's resulting conclusion that a loss in the value of duplexes results from the installation of the sanitary sewer because he did an incomplete appraisal. This hearing officer believes and

finds as Mr. Johnson and Mr. Smith testified and Mr. Schuur's appraisal of single family homes indicates that the installation of a sanitary sewer will increase property values generally (according to the Schuur analysis an average of $7000 per unit) and is probably equally applicable to the duplex properties as well. Having so determined it appears to this hearing officer that a special benefit on average equal to the assessment of $7000 per benefit exists as best can be determined from the limited valuation information provided in this record.

Special assessment determinations are peculiarly legislative in nature and within the purview of local authorities, absent fraud, mistake or abuse of discretion (such that produces a disproportionate result per **Dixon**, **supra**) none of which appear in the facts of this case. Therefore, having determined petitioners' properties were specially benefited and that no fraud, mistake or abuse of discretion that adversely affected any of the petitioners herein, it is concluded that the special assessments herein should be affirmed.

Judgment

IT IS ORDERED AND ADJUDGED that the special assessments levied against petitioners be and are AFFIRMED and these appeals are DISMISSED.

IT IS FURTHER ORDERED AND ADJUDGED that the parties to this cause of action shall have 20 days from the date of entry of this Proposed Judgment to file exceptions and written arguments with the Tribunal

consistent with Section 81 of the Administrative Procedures Act [MCL 24.281; MSA 3.560(181)]. The parties in presenting exceptions and written arguments shall limit them to the evidence and testimony presented to the hearing officer. This Proposed Judgment together with any exceptions and written arguments shall be considered by the Tribunal in arriving at a final decision in this matter pursuant to Section 26 of the Tax Tribunal Act [MCL 205.726; MSA 7.650(26)].

MICHIGAN TAX TRIBUNAL

By, James R. Neumann

Entered: June 5, 1992

Court of Appeals, State of Michigan

Order

MICHAEL J. KELLY

Docket Numbers

Presiding Judge
MARILYN KELLY

155781 and 156507

KATHLEEN JANSEN
Judges

Joseph Boltach, et al v. Dexter Township

The Court orders that the motion to affirm pursuant to MCR 7.211(C)(3), is DENIED for failure to persuade the Court that it is manifest that the questions to be reviewed are so unsubstantial as to need no argument or formal submission or were not properly raised.

Seal
Michigan
Court
Of Appeals

A true copy entered and certified by Ella Williams, Chief Clerk, on

October 25 1993 /s/ Ella Williams
Date Chief Clerk

Court Of Appeals, State Of Michigan

ORDER

Clifford W. Taylor
Presiding Judge

Joseph Boltach v Dexter Township

Docket Numbers 155781 and 156507

Richard Allen Griffin
William G. Schma
Judges

The Court Orders that the motion for rehearing is DENIED.

Seal
Michigan
Court
Of Appeals

A true copy entered and certified by Ella Williams, Chief Clerk, on

May 30 1995
Date

/s/ Ella Williams
Chief Clerk

Michigan Supreme Court
Lansing, Michigan

Order
Entered: March 29, 1996

Docket Number 103401

James H. Brickley
Chief Justice
Charles L. Levin
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Conrad L. Mallett. Jr.
Elizabeth A. Weaver
Justices

JOSEPH P. BOLTACH AND ABRAHAM V WILLIAMS, JR.,
Plaintiffs-Appellants,
v
DEXTER TOWNSHIP,
Defendant-Appellee.

On order of the Court, the motion to strike is considered, and it is DENIED. The application for leave to appeal is also considered, and it is Denied because we are not persuaded that the questions presented should be reviewed by this Court.

Seal Michigan Supreme Court

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.
March 29, 1996 /s/ Corbin R. Davis

Leave Denied

Michigan Supreme Court
Lansing, Michigan
Docket Number 103401

Order
Entered: June 18, 1996

James H. Brickley
Chief Justice
Charles L. Levin
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Conrad L. Mallett. Jr.
Elizabeth A. Weaver
Justices

JOSEPH P. BOLTACH AND ABRAHAM V WILLIAMS, JR.,
Plaintiffs-Appellants,
v
DEXTER TOWNSHIP,
Defendant-Appellee.

On order of the Court, the motion for reconsideration of this Court's order of March 29, 1996 is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

Seal
Michigan
Supreme
Court

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 18, 1996 /s/ Corbin R. Davis

State Of Michigan
Michigan Tax Tribunal

Lawrence Baughn, et. al
Petitioners,
v
Dexter Township
Respondent.

Docket Numbers

124693 through 124709

[Attorney information omitted]

1. All Petitioner's except Joseph P. Boltach are residents of the part of Dexter Township known as Portage Heights Subdivision.
2. Joseph P. Boltach is a resident of Dexter Township in the land adjoining, but south of the Portage Heights Subdivision.
3. On April 18, 1989, the Dexter Township board approved a special assessment on Petitioner's subject property.
4. Exhibit 1, attached, is a complete list of parcel I.D. numbers, the number of taps assigned to the parcels, the Tax Tribunal Docket numbers and Petitioner's names for each subject property.
5. The special assessment in controversy is $7,000 per sewer tap.

Events And Factual Basis

6. The minutes of the Dexter Township Board for February 3, 1987, indicate:

"Moved by Smith, supported by Eisenbeiser to cause the Township Supervisor and the Township Attorney to develop a preliminary

special assessment district for the propsed [sic] waste water treatment system sections 1 and 2, Portage Lake, Dexter Township and present same to the Township Board.

Yea-5, nay-0 Carried."

7. The minutes of the Dexter Township Board for May 19, 1987, indicate:

"Moved by Doeltzky, [sic] supproted [sic] by Smith to have the supervisor contact Putnam, Webster and Hamburg Townships regarding use of possible excess wastewater treatment capacity.
Carried."

8. The minutes of the Dexter Township Board for September 6, 1988, indicate:

"Moved by Doletzky, supported by Knight to authorize McNamee, Porter & Seeley to prepare an assessment roll, map and descriptions for the Portage Lake Sewer Authority.
Carried."

9. There is no evidence that McNamee, Porter & Seeley was provided with either general or specific instructions about how to establish the boundaries of the special assessment district, nor about how to allocate taps within the district.

10. During October, 1988, the Townships of Dexter, Putnam, Webster and Hamburg joined together and formed the Portage-Base Lakes Area Water and Sewer Authority (Authority) under the provisions of MCL 124.281 et. seq.; 1955 PA 233, (Public Act 233), and adopted Articles of Incorporation by action of their respective township boards.

11. Between December, 1988 and February, 1989, Dexter Township Board Supervisor Jim Drolett worked with the firm of McNamee, Porter and Seeley to prepare a special assessment role.
12. Petitioner's property was included in the preliminary special assessment role.
13. At the time the petitioner's property was included in the preliminary special assessment district, there was no evidence that any of the Petitioners' properties had active [septic] system problems.
14. At the time the petitioner's property was included in the preliminary special assessment district, there was no evidence that any of the Petitioners' properties were in violation of any public health code.
15. At the time the petitioner's property was included in the preliminary special assessment district, there was no evidence that any of the Petitioners' properties were emitting any harmful effluent.
16. At the time the petitioner's property was included in the preliminary special assessment district, there was no evidence that any of the Petitioners' properties were emitting effluents of any kind that contributed to the pollution of either Portage Lake, or Little Portage lake.
17. At the time the petitioner's property was included in the preliminary special assessment district, there was no evidence that any of the Petitioners' had a septic system that created any health risk to the [sic] any of the Petitioners' property's occupants.

18. At the time the petitioner's property was included in the preliminary special assessment district, there was no evidence that any of the Petitioners' properties had a septic system that created any health risk to occupants of neighboring properties.

19. The minutes of the Dexter Township Board for February 7, 1989, indicate:

"Moved by Doletzky, second by Knight to adopt a resolution to establish a public hearing date and time, and causing the Clerk to file notice of same in a newspaper of general circulation in the District and send first class mail notices to owners of or persons in interest in property in the Special Assessment District.

Yes - Smith, Doletzky, Knight, Drolett, Eisenbeiser

No - None"

20. As of February 7, 1989, there was still no evidence that any of the Petitioners' properties should be included in the special assessment district.

21. The minutes of the Dexter Township Board for March 21, 1989, indicate:

"Mary Ann Hitchcock - 9815 Betty Place, Pinckney, presented a petition - 28 signatures."

22. At the time the petition was received, Dexter Township Board could not proceed with the sewer project if it were to lose the more than $200,000 income to be generated by the Portage Heights Subdivision.

23. At the time the petition was received, had Dexter Township not been able to participate in the sewer project due to an inability to finance its share of the project's cost, the entire four-township project would have been jeopardized.

38. In order to avoid the need for an additional ad valorem property tax, the Dexter Township Board attempted to find a way to fund the sewer that would not require voter approval.

39. In that effort, Dexter Township passed a resolution requesting that Washtenaw County study, design, construct, operate, manage and finance a sewer system for Portage Lake residents under the provisions of MCL 123.731 et. seq.; 1957 Public Act 185 (Public Act 185).

40. Washtenaw County subsequently decided to exercise its authority under the provisions of Public Act 185.

41. The Dexter Township Board has repeatedly presented three reasons, and only three reasons for desiring to build the proposed sewer:

    A. To protect the quality of the public's navigable waters known as Little Portage Lake, Portage Lake, Base Lake, and the Huron River;

    B. To protect the public health, safety and welfare:

    C. To provide a special benefit to property owners who have or who are likely to have inadequate or failed septic systems and who are or who likely will be, due primarily to lot size and ground characteristics, unable to install adequate septic systems.

42. The characteristics of the properties that will be specially benefited by the proposed sewer have been described by the Washtenaw County Health Department and by Respondent as with many of the following characteristics:

A. Less than 100 feet from surface water such as Portage Lake;

B. Lot size so small that there is no room for an adequate drain field;

C. Lot size so small that there is no way to achieve adequate separation distances (distance between the drinking water well and any of several other objects, such as the drain field, the septic tank, the property line, etc.)

D. Presently have failed or failing septic systems, no septic systems at all, or septic systems with a capacity below minimum standards.

E. Structures, including septic systems, are more than 40 years old.

F. Lots are located in an area where the water table is near ground level.

G. Lots where the soil type is not suitable for proper septic system operation.

H. Lots with buildings and septic systems originally built for seasonal use. Although many of the buildings were altered for year round use, the septic systems, in many cases, were not upgraded accordingly.

43. The Washtenaw County Health Department and Respondent have continually pointed to the lake front properties and the second tier of houses

back from the lake as examples of properties that will be specially benefited by the sewer.

44. The Petitioners properties have most of the following characteristics:

A. Minimum distance to surface water such as Portage Lake is in excess of 150' feet. The average distance is far in excess of 200'.

B. Lots are so large that most have room for two adequate drain fields. All lots have sufficient room for at least one adequate drain field.

C. Lots are so large that they meet applicable code requirements for separation distances. Many meet or even exceed the current code requirements.

D. Lots presently have septic systems which meet or exceed applicable codes. Many meet or even exceed the current code requirements.

E. Lots presently have septic systems whose life expectancy is greater than the Michigan Department of Natural Resource's estimate of the life expectancy of the presently designed sewage treatment facility.

(Michigan Department of Natural Resources computes that the system as presently designed will violate the discharge permit after 14 to 17 years when the ground between the effluent discharge and Little Portage Lake can no longer absorb the pollutants the system will emit.)

F. Lots presently have septic system capacity far above the capacity provided per tap by the proposed sewer system.

G. Structures, including septic systems, are less than 30 years old.

H. Lots are located in an area where the water table is so high that the houses have full or partial basements.

I. Lots have the soil type that is ideal for proper septic system operation.

J. Lots have buildings and septic systems that were designed and built for year round use.

45. Dexter Township Board Supervisor, Jim Drolett, has claimed that the primary reason for including the Petitioners' property in the special assessment district is that Petitioner's use the lake.

46. No petitioner presently presents a health risk to themselves, their neighbors, those who use the chain of lakes nor the general public.

47. Respondent has yet to provide any verified evidence that any petitioner presently presents a health risk to themselves, their neighbors, those who use the chain of lakes nor the general public.

Count 1

48. Dexter Township's February 20, 1990 resolution provides as follows:

> "2. All resolutions and parts of resolutions insofar as they conflict with this resolution be and the same are hereby rescinded."

49. That same resolution indicates the Dexter Township Board's finding "that is impractical and financially unsound" to proceed under Public Act 233.

50. Dexter Township Board's Special Assessment Roll Resolution 3 provides funding only for a sewer system to be designed, constructed, operated, maintained and financed by the Authority under Public Act 233.

51. Washtenaw County's decision to build the sewer under the provision of Public Act 185 provides the County with exclusive jurisdiction over all questions relating to design, construction, operation, maintenance and financing of a Washtenaw County sewer to serve the Portage Lake are residents.

52. Because Respondent's Special Assessment Roll Resolution #3 is inconsistent with its February 20, 1990 resolution, it is rescinded.

Count 2

53. 1957 Public Act 185 vests Washtenaw County with exclusive authority to determine the method of financing public improvements it is authorized to acquire.

54. Because the system is being built by the County under Public Act 185 and is not being built by the Authority under Public Act 233, Respondent has no legal authority to levy a special assessment.

Count 3

55. Under Public Act 233, if Dexter Township desires to finance a public improvement by means of a special assessment, the special

assessment must conform to the requirements of MCL 41.721 et. seq.; 1954 PA 188 (Public Act 188) except that "a petition shall not be required from property owners. Public Act 233 § (a).

56. Public Act 188 § 4 provides:

(1) the township board, if it desires to proceed on the improvement, shall cause to be prepared plans describing the improvement ...

(2) The township board shall fix a time and place to meet and hear any objections ... to the improvement, and to the special assessment district, and shall cause notice of the hearing to be given as provided in section 4a.

(3) ...

(4) ... If at any time during the term of the special assessment district an actual incremental cost increase exceeds the estimate therefore by 10% or more, notice shall be given as provided in section 4a and a hearing afforded to the record owners of property to be assessed.

57. Respondent's hearing notice is defective because the improvement that is being built by Washtenaw County is not the one described in Respondent's hearing notice.

58. The sewer system that is being built is not the one described in Dexter Township's special assessment resolution because:

A. It is being built by Washtenaw County, not the Authority.

B. It is being funded by Washtenaw County, not by the Authority.

C. It is being built under authority provided by Public Act 185, not under authority provided by Public Act 233.

D. The Authority continues to lack a valid contract to do anything.

E. The estimated cost of the county sewer is not less than $1.1 million dollars higher than the estimated cost of the Authority's former sewer proposal.

59. Respondent's hearing notice failed to indicate that Respondent would hear objections to either proposed improvement.

60. Respondent failed to provide a hearing as required by Public Act 188 § 4 (4).

61. Because Respondent has failed to comply with applicable law, its special assessments against Petitioners' properties are void.

Count 4

62. By July 21, 1988, McNamee, Porter & Seeley had already estimated the project cost to be approximately $9,000,000.

63. Respondent had also determined that the special assessment had to be kept at $7,000 or less in order to be affordable.

64. Respondent had planned since 1986 to finance the entire project through special assessments.

65. In order to be able to raise its portion of the proposed project cost, it was necessary for Dexter Township to allocate 420 taps.

66. Petitioners were included in the special assessment district solely to generate revenue.

67. Because no special assessment statute authorizes the Respondent to use a special assessment tax as a means of raising revenue for public use, Respondent's special assessment is invalid as to all Petitioners.

Count 5

68. Because Petitioner's are being taxed to provide a general benefit to the general public, and to provide a special benefit to owners of property on or near the lake, they are being deprived of private property, specifically both cash and their functioning septic system, for a public purpose.
69. Under both United States and Michigan's constitution, Respondent's act is an inverse condemnation of Petitioners' property.
70. Under both United States and Michigan's constitution, Respondent's act is illegal unless Respondent provides substantive due process to each Petitioner, and then provides just compensation to the Petitioner's.
71. Neither Public Act 185 nor Public Act 233 provide Petitioner's with the substantive due process required by either constitution.
72. Respondent's have not provided Petitioners with just compensation for their property losses.

Count 6

73. Public Acts 185 and 233 provide a mechanism for special assessment only against those property owners who are specially benefited by a proposed improvement.
74. Neither Public Act 185 nor Public Act 233 authorize the use of special assessments for public improvement projects beyond the extent

to which particular land owners receive a special benefit.

75. The United States, the State of Michigan, Washtenaw County and the Dexter Township Board have all declared that the general public has a major interest in protecting lake water quality.

76. The State of Michigan, Washtenaw County and the Dexter Township Board have all declared that the general public has a major interest in protecting the quality of the water in the Chain of Lakes, including Base Lake, Little Portage Lake, and Portage Lake.

77. The State of Michigan, Washtenaw County and the Dexter Township Board have all declared that the one most important reason for providing a sewer in the Portage Lake area is to protect lake water quality.

78. Nevertheless, Respondent allocated no portion of the project cost to the general public.

79. Washtenaw County and Respondent have each repeatedly declared that another important reason for building the County's sewer is to provide relief to those property owners who are or will be unable to adequately process the waste water generated on their property.

80. Nevertheless, Respondent allocated the same portion of the project cost to those who will have a deed restriction removed as to those who will never need a sewer.

81. Respondent also allocated the same portion of the project cost to those who will be able to develop presently unbuildable properties as to those who's property is already developed.

82. Because Respondent failed to distribute the benefits and burdens of the proposed improvement according to any rational basis, if the Tribunal determines that petitioners should remain in the district, the amount of each Petitioners' special assessment should be redetermined after the benefits are properly distributed.

Relief Requested

* * *

Respectfully submitted,

Dated: December 7, 1990

Joel S. Welber (P 23082)
Attorney for Petitioners

MR. WELBER: Now, what you're about to hear concerns a proposed sewer going into the Portage Lake community. And the history of this sewer is – is a dynamic history. By that I mean that the legal foundation of the sewer has changed even from the time that this special assessment district, in which my clients are included, was confirmed.

And, just by way of background, although it's not necessarily germane to the issues in this case, this was initially intended to be a sewer constructed under Public Act 233, and based upon a combination of four townships, Dexter being one of them. Two of the four townships located in Livingston County and two in Washtenaw County.

After the special assessment district was confirmed – and indeed, after the petitions were filed in this Tribunal – there would had – there was a voter referendum.

The project, as a result of this referendum, was switched to a sewer that is owned and constructed by Washtenaw County under Public Act 185.

We are not challenging the statutory basis for the inclusion of these Petitioners under Public Act 145, as opposed to Public Act 233. And the technical arguments that we previously raised in our petition, are not being pursued at this point.

But we will prove a more important proposition. Specifically, that these Petitioners should not substantively be included in this sewer project under any statute.

Petitioners contend, and we will prove, that there is no rational basis for the inclusion of these Petitioners in this sewer and that, at the time of the confirmation of

the sewer assessment district, the Dexter Township Board of Trustees neither adopted nor employed any rational standard under which the Petitioners would be so included.

As a result, we will request that the Tribunal void the special assessments attached to Petitioners' property, as having no legal basis under any statute, since there's no governmental body that has -- that has included them in conformance with any rational standard or -- or a standard that can be articulated by that body.

Petitioners will also prove that since there is no rational basis for their inclusion, the only conclusion that can be drawn from the fact that they are included, is that they were included to generate revenue for this project.

Since we will ask the Tribunal to make this finding, we will further ask the Tribunal to void the special assessment as a matter of law, since a special assessment cannot generally be used to raise revenue -- or, raise general revenue.

Petitioners will further prove that they will receive no special benefit that is required to justify the assessment as a matter of law. Even if they were lawfully included, we will prove that they do not specially benefit from this sewer as is required by law of the state.

None of the Petitioners' property is being relieved of a burden. None of the Petitioners' property is becoming suitable for a higher or better usage. And none of the Petitioners' property will increase in value as a result of this assessment and benefit.

In fact, Petitioners will prove that they, unlike others within the assessment district, will be burdened

by this sewer as it will result in a taking of their functioning, self-contained, disposal systems which are septic and drainfield, and will replace those systems with a more restrictive sewer.

This constitutes a taking of the property for public benefit without compensation.

Petitioners will prove that they will receive no benefit as a matter of law through an increase in property value. In doing this, Petitioners will show that the appraisal of their properties which suggest an incremental increase in value, is inaccurate and based upon incorrect factual assumptions.

Petitioners will show that at best, the transaction will be awash from a financial standpoint, thus no special benefit will be realized as a matter of fact and law. Petitioners will further show that even within the assessment district, the benefits are improperly allocated for at least two reasons.

The first reason, is that indetiful -- identifiable properties which will benefit disproportionately to other identiful -- identifiable properties, are assessed at the same rate. And this is legally impermissible.

Second, and more crucially, no portion of the cost of this project has been allocated to the general public, not withstanding a clear public benefit that will be repeatedly proven through the testimony.

That is our position and we're ready to begin taking evidence in support of the petitions.

Excerpts From
Petitioners Closing Argument

Respondent's failure to develop a specific standard made it easy and likely that it would overlook important sources of evidence. It also made it easy and likely the Respondent would misunderstand or misinterpret the evidence it did have. Failure to develop a rational standard made it easy and likely that Respondent's ultimate decisions on the question would be arbitrary and without either factual or legal support.

* * *

Because Respondent failed to follow the established procedure, particularly the part requiring the development of a reasonably precise standard for inclusion, Respondent not only denied Petitioners of several federal and state constitutional rights and failed to comply with the technical requirements of the applicable statutes, but it also taxed Petitioners at an unlawful rate for an economic benefit that Respondent's expert proved they are not likely to receive. Petitioner's Closing Argument, p 5.

"In addition, to comply with Equal Protection guarantees of the federal and state constitutions, the administrative standards must be developed using classifications that are based on naturally distinguishing characteristics, and are applied such that all members of each classification are treated similarly. [State cite] **Allied Stores of Ohio** v **Bowers**, 358 US 522; 79 Sct 437; 3 LEd2d 480 (1959).

* * *

"Upholding the constitutional requirements of uniformity and equality is the just and ultimate purpose of the law. **Sioux City Bridge Co** v **Dakota County**, 260 US 441; 43 SCt 190; 67 LEd 340 (1932), **Armco Steel**. Closing, p 11.

Petitioners argue that because Respondent had already decided to tax all properties at a flat rate of $7,000 per tap, it never even considered the question of benefit in terms of dollar value. As a result, it made three serious errors:

1. It failed to allocate a portion of the burden of the project to the general public in proportional [sic] to the benefit the general public is expected to receive;
2. It failed to allocate the remaining portion of the burden between the property owners in proportion to the relative special benefit each property owner was expected to receive;
3. If failed to exclude from the assessment district or from the tax roles at least, those properties, including the Petitioners, who will receive an economic burden rather than receiving a special benefit attributable to the sewer." Closing, p 28.

"Distribution of the burden of a local public improvement is controlled by four constitutional guarantees: Due Process, Equal Protection, Just Compensation, and Uniformity of Tax. Each special assessment statute contains specific instructions consistent with these constitutional guarantees." Closing, p 46.

"The second test is whether the burden changes in reasonable proportion to the change in benefit each property receives. ... **Crampton**, 362 Mich 503, 520; 108 Nw2d 16, 25 (1961), quoting 48 AmJur 618."

* * *

"The third test is derived from the Equal Protection Clause of the Michigan and Federal Constitutions, and the Uniformity of Tax Clause of the Michigan Constitution... Closing, p 50.

Excerpts From Memorandum In Support Of Petitioners Exception To Proposed Judgment

"Petitioners introduced evidence that:

1) Although the proposed sewer project was implemented to protect the public's interest in pristine recreational lakes and rivers, Respondent allocated zero percent of the project cost to the general public.

2) Although the value of the sewer to [sic] would vary significantly from property to property, the Respondent allocated the burden of the project on a per tap basis.

3) Respondent arbitrarily confirmed its special assessment district without developing a rational standard for the decision and without developing a reasonable factual basis for its decision.

...

Each of these errors is a separate violation of Petitioners' federal and state constitutional rights to equal protection, due process and just compensation for property taken for a public purpose. ..." Memorandum, unnumbered page 2.

Excerpts From
Petitioners' Brief On Appeal

"Principle Points of Argument:

Duty to perform constitutional and statutory legal duties as a condition precedent to valid exercise of authority. 10

Duty to distribute special assessment burdens within the district as required by the constitution and statute. 13

Duty to distribute proportion of burden to general public as required by the constitution and statute. 22

Duty to provide substantive due process as required by constitution and stature [sic] 25

Duty to base decisions on competent, material and substantial evidence on the whole record. 31

Brief, p i.

The Equal Protection guarantees of the federal and state constitutions also require the use of the process dictated by the legislature:

> 'Where an ordinance fails to include and affect alike all persons of the same class, and extends immunities or privileges to one part and denies them to others of like kind by unreasonable or arbitrary classification, the same is contrary to the equal protection guarantees of the State and Federal constitutions.' **Armco Steel** v **Dept of Treasury**, 419 Mich 582; 358 NW2d 839,

843 (1984), quoting **Beauty Built Construction Co**, 134 NW2d 214... .

Brief, p 19. (Same quote and citation appear under due process argument at page 27).

"Upholding the constitutional requirements of uniformity and equality is the just and ultimate purpose of the law. **Sioux City Bridge Co** v **Dakota County**, 260 US 666; 43 SCt 190; 37 LEd 340 (1923), **Armco Steel**.

Brief, p 21. (Same statement and citation appear under due process argument at page 29).

> "In our judgment, the exaction for the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation. ... [State citation omitted] quoting **Norwood** v **Baker**, 172 US 269; 19 SCt 187; 43 LEd 443.

Brief, p 36.

State Of Michigan
In The Court Of Appeals

JOSEPH P. BOLTACH et. al.
Petitioner-Appellants,
v
DEXTER TOWNSHIP,
Respondent-Appellee.

[Attorney names and addresses omitted]

Appellee's Motion To Affirm

Now comes Appellee, by and through it attorneys and moves this Court to issue an order affirming the judgment of the Michigan Tax Tribunal pursuant to the analysis provided by the Michigan Supreme Court in ***Kadzban***, et al. v ***City of Grandville***, ___ Mich ____ (Docket No. 92796) for the reasons addressed in the attached memorandum.

Respectfully submitted,

/s/ Peter C. Flintoft (P 13531)
Attorney for Appellee

* * *

Dated July 21, 1993

Excerpts From Petitioner's Michigan Court Of Appeals Motion For Rehearing

"22. As argued on appeal to this Court, appellants proved at the hearing that appellee failed to adopt any standard or rational basis for including appellants in the special assessment district, thereby depriving them of their property without the due process of law required by the Michigan and US Constitutions.

23. The question of whether appellants were denied their constitutional protection by appellee's failure to adopt and employ standards in determining whom to include in the special assessment district, and how to allocate the benefit and the burden between district residents themselves, and between district residents and the general public, is clearly and properly before this Court, having not been waived by appellants at any time."

Motion, p 6.

Excerpts From Plaintiff/Appellants' Application For Leave To Appeal To The Michigan Supreme Court

Appellants seek this leave to present four questions to this court. The questions are:

1) Does the use of a common law presumption of validity violate a petitioner's right to seek judicial relief from an alleged unauthorized special assessment pursuant to Const. 1963, Art. 6, § 28 and MCL 205.735(1)?
2) Does the use of a flat rate, "per tap" assessment of $7,000 deprive a petitioner of fundamental constitutional rights, where the evidence clearly and convincingly proves that the actual value of the tap varies substantially from one parcel to another parcel within the assessment district?
3) Does a township's failure to allocate any cost of a sewer project to the general public's benefit deny a petitioner his right to be free from unconstitutional takings under Art. 10, § 2 and applicable Michigan statutes?
4) Does a township's failure to create any standard to determine assessment boundaries and allocate benefits and burdens between the district's properties deprive a petitioner of her right to constitutional due process?

Application, unnumbered opening page.

Excerpts From Petitioners' Motion For Reconsideration And From Petitioners' Brief In Support.

"Petitioners ask this court to reconsider its March 29, 1996 decision ... for the reasons stated in the accompanying brief."

Petitioners Motion for Reconsideration, unnumbered first page.

"Argument

1. 15

When Petitioners present several specific claims of constitutional error concerning a township administrative resolution, the Michigan Supreme Court is charged with the duty to protect Petitioners' federal and state substantive due process rights by ensuring that each and every claim receives a judicial review and determination."

Petitioners Brief Support, page i.

No. 96-438

Supreme Court, U.S.
FILED
NOV 22 1996
CLERK

In The

Supreme Court of the United States

October Term, 1996

JOSEPH P. BOLTACH,

Petitioner,

v.

DEXTER TOWNSHIP,

Respondent.

ABRAHAM V. WILLIAMS, JR.,

Petitioner,

v.

DEXTER TOWNSHIP,

Respondent.

On Petition For A Writ Of Certiorari To The Michigan Court Of Appeals

RESPONDENT DEXTER TOWNSHIP'S BRIEF IN OPPOSITION TO PETITIONERS JOSEPH P. BOLTACH'S AND ABRAHAM V. WILLIAMS, JR.'S *PETITION FOR WRIT OF CERTIORARI*

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Did the Michigan Court of Appeals and the Michigan Supreme Court refuse to consider Petitioners' purported state and federal constitutional claims, and, if so, did this refusal deprive Petitioners "of their Fourteenth Amendment right to due process"?

2. Did Petitioners properly raise, in the Michigan appellate courts, their claim that they were deprived of their Fourteenth Amendment right to due process as a result of the Michigan appellate courts' alleged failure to consider Petitioners' constitutional claims, and, if not, is this claim properly before this Court?

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Respondent Dexter Township (the "Township") submits this Brief in Opposition to Petitioners Joseph P. Boltach's and Abraham V. Williams, Jr.'s Petition for Writ of Certiorari.

JURISDICTION

Petitioners are seeking to invoke the jurisdiction of this Court under two sections of the United States Constitution and 28 U.S.C. § 1257(a). However, Petitioners cannot properly invoke this Court's jurisdiction under any of those provisions. The two cited Sections of the United States Constitution do not provide this Court with jurisdiction over Petitioners' petition. Moreover, Petitioners cannot establish jurisdiction under 28 U.S.C. § 1257, because they have not shown that the Fourteenth Amendment due process claim which they are asserting in their Petition was properly "set up or claimed" in the prior state court proceedings.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

The provisions of the Michigan and United States Constitutions cited in Petitioners' Petition are not relevant to that Petition, with the exception of the portion of the Fourteenth Amendment to the United States Constitution providing that "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . " Rather, 28 U.S.C. § 1257(a) should be dispositive of the Petition before the Court. That statute provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of

a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

COUNTER-STATEMENT OF THE CASE

This case involves Petitioners' challenge to a special assessment which was enacted to finance a public sewer system. Petitioners own single-family and rental duplexes near Portage and Base Lakes in Dexter Township, Michigan. Each structure is served by an individual septic system and well. The age and poor condition of many of the area's septic fields, the area's population density, and the area's soil conditions and hydrology have resulted in persistent sanitation problems, frequent unavailability of potable well water at nearby homes, and the contamination of the lakes, groundwater, and wells. Many homes were previously unsuitable for normal household activities or for year-round use due to the severity of the septic problems. In response to this crisis, Dexter Township joined together with other area townships to create a Water and Sewer Authority and to establish a special assessment district to finance a public sewer system.

Petitioners petitioned the Michigan Tax Tribunal ("MTT") for relief from the assessment. Following six days of hearings, the MTT hearing officer found that properties with detached homes were specially benefited and that the properties' value enhancement was reasonably proportionate to the amount levied. As to the duplexes, the hearing officer found that Petitioners had

failed to provide reliable or credible evidence overcoming the presumption that the assessment was in the proper amount and was otherwise valid, and that the evidence supported a finding that the duplex properties were enhanced in the amount levied.

Petitioners' properties are part of a very densely developed shoreline with three tiers of dwellings ascending uphill from the lake level. Petitioners' septic fields were "grandfathered" and did not conform to the then-current County Health Department regulations for new installations, requiring some zoning or Health Department variance for future expansions. (Tr. III, pp. 607-614) Petitioner Boltach owns seven household units – one detached single family home and three duplexes. Petitioner Williams owns a detached home.

The area was "very, very dense," mostly original cottages forty to seventy years old intended only for seasonal use, now upgraded to year-round homes. The Health Department imposed deed restrictions providing for limited use due to the severe septic problems. (Tr. VI, pp. 1402-1403) Some properties in low-lying, densely populated areas were adjacent to higher gradient properties, such as the Boltach units, and therefore subject to cross-lot septic effluent drainage towards the lakes. These septic fields provided inadequate long-term waste treatment and contaminated neighboring properties' well water. Outhouses were present, and the ground had become saturated in other areas. (Tr. I, pp. 32-55; Johnson Depo Tr. pp. 8-9; Tr. VI p. 1434).

For over ten years, the severe septic waste problems had contaminated wells with unacceptably high levels of nitrates and coliform bacteria. Residents were unable to wash laundry or flush toilets, and sewage backed up due to the high water level. In low-lying properties, these

hazards were magnified by the movement of contaminated groundwater from one lot to the next. The increased cumulative effects of these problems in "downstream" properties were confirmed by studies conducted in 1973 and 1984 by the Washtenaw County Health Department. (Tr. I, pp. 41, 50-55; Tr. IV, p. 940; Johnson Depo Tr. p. 12)

In their Brief on Appeal in the Michigan Court of Appeals, Petitioners acknowledged the following severe problems: (1) inadequacy of individual septic fields due to the high population density, the high water table, and the proximity of the lots to public waters, (2) insufficient lot size to sustain adequate drain fields and isolation distances between septic fields and wells, (3) unsuitable soil for draining, and (4) serious long- and short-term health threats to the residents, especially infants. (Petitioners' Brief on Appeal, pp. 2-3.)

Raymond Smit, a Portage Lake resident and CEO of the project's engineering firm, and an expert in the design of Michigan sewer facilities, described the inadequate septic systems, opining that septic fields in these circumstances will contaminate nearby wells and fail. (Tr. VI, pp. 1405-1407) "A septic facility in this kind of environment is a temporary expedient and it's just a question of time until it fails." (Tr. VI, pp. 1325-1326, 1434)

On the basis of recommendations from the Huron River Watershed Council, the Livingston and Washtenaw Counties Health Departments, the engineering firm, and bond counsel, Dexter Township joined Webster, Putnam, and Hamburg Townships, all of which border the lakes, to create the Portage and Base Lakes Area Water and Sewer Authority. (Tr. V, pp. 1157-1158; Johnson Depo Tr. pp. 9-12; Eisenbeiser Depo Tr. pp. 14-15; Tr. VI, pp. 1330, 1393; Drollett Depo Tr. p. 7) The project was approved by the Water and Sewer Authority, the Michigan Department

of Natural Resources (the "MDNR") and the Michigan Water Resources Commission.

The townships collectively developed special assessment districts to spread the cost equally. There was a $7,000.00 assessment upon all 411 dwelling units, whether attached or detached, and regardless of ownership. (Drollett, Tr. III, pp. 564-567, 583-585, 592, 616; Tr. VI, p. 1330; Eisenbeiser Depo Tr. pp. 12-13, 18; Knight Depo Tr. pp. 19-21)

At the hearings to confirm the special assessment roll, Petitioners appeared with counsel and objected. The Township refused to exclude these properties because of the identification of the Boltach property in the Swanson Environmental Survey as contributing to one of the area's worst plumes of contamination, the presence of nitrate levels in neighboring wells, and violations of the County Health Department standards, particularly the duplexes, which had only one drain field for two units. The County's Health Department verified all these problems to the Township as part of the Board's review. (Tr. V., pp. 1159-1161; Doug Smith Depo Tr. pp. 6, 7)

Petitioners and several others petitioned the MTT for relief from the special assessment. Six days of hearings were conducted, and exhibits and memoranda submitted. At the time of the hearing, the sewer project was approximately 66% complete. (Tr. III, 645)

Petitioners testified as laypersons as to the value of Boltach's duplexes, and offered no expert testimony addressing this issue. Petitioners' expert witness testified that, under a "discounted cash flow" approach to valuation, the duplex properties would incur a loss. The testimony included no analysis under the cost and market approaches to valuation, nor a correlation between these approaches for a final analysis. Moreover, the approach utilized by this expert resulted in five *different* value

estimates, at least one of which supported the Township's conclusion that the duplexes were benefited by the system in the amount assessed. (Tr. VII p. 1449-1593)

The MTT hearing officer found that the properties with detached homes were specially benefited by the sanitary sewer special assessment project, that the value enhancement realized by Petitioners was reasonably proportionate to the cost, and that Petitioners' lay testimony as to the properties' devaluation was unsupported by the required analysis. (Proposed Judgment, p. 11) As to the duplexes, the hearing officer found that Petitioners had improvidently relied upon valuation evidence which fell far short of the required professional appraisal standards, and had thus failed to show that the assessments were excessive or to otherwise show that the assessments were invalid. (Proposed Judgment, pp. 11-12) The hearing officer made a specific finding that the record supported the assessment of the duplexes. The MTT adopted the findings of its hearing officer, and, accordingly, denied Petitioners' request for relief.

Petitioners appealed as of right to the Michigan Court of Appeals. On March 10, 1995, the Court of Appeals issued a one-page Memorandum Opinion holding that the Tax Tribunal's factual findings were supported by competent, material, and substantial evidence on the whole record. The Court of Appeals further held that Petitioners had abandoned their constitutional claims by "affirmatively announc[ing] [before the MTT] that they would not pursue the technical [constitutional (bracketed insertion by the Court)] arguments raised in their petition" to the MTT. (PA, p. 1a) The Court of Appeals further stated that "[w]e are not convinced that a miscarriage of justice would occur were we not to rule upon these unpreserved issues." (Id.) Petitioners' subsequent motion for rehearing was denied. (PA, p. 19a)

Petitioners then filed an Application for Leave to Appeal to the Michigan Supreme Court, raising the same issues that they had raised in the Michigan Court of Appeals.

On March 29, 1996, the Michigan Supreme Court denied Petitioners' Application for Leave to Appeal. Petitioners thereupon filed a Motion for Reconsideration, raising, for the first time, their claim that they had been deprived of their Fourteenth Amendment right to due process of law as a result of the alleged failure of the Michigan Court of Appeals to consider Petitioners' constitutional arguments. The Michigan Supreme Court denied Petitioners' Motion for Reconsideration on June 18, 1996.

On September 16, 1996, Petitioners filed the instant Petition.

ARGUMENT

I. PETITIONERS' CLAIM THAT THEY WERE DEPRIVED OF THEIR FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AS A RESULT OF THE MICHIGAN COURTS' ALLEGED FAILURE TO CONSIDER PETITIONERS' CONSTITUTIONAL CLAIMS WAS NEVER PROPERLY PRESENTED TO OR DECIDED BY THE MICHIGAN SUPREME COURT, AND THEREFORE IS NOT PROPERLY BEFORE THIS COURT.

According to Petitioners, their Petition presents only one question:

> Does a state deprive citizens of their Fourteenth Amendment right to due process when its courts affirm a local government act after repeatedly refusing citizen requests to determine whether the local government act is or is

> not unconstitutional under several clauses of both federal and state constitutions?

Although the language employed by Petitioners in framing this issue (hereinafter the "Issue" or "Issue on Appeal") is not a model of clarity, it appears that Petitioners are contending (1) that they asked one or more Michigan courts to determine whether their inclusion in a special assessment roll was constitutional under "several clauses of both federal and state constitutions;" (2) that these requests were "repeatedly refus[ed]" by these Michigan courts, and (3) that this alleged refusal deprived Petitioners of their "Fourteenth Amendment right to due process."

Notably absent from Petitioners' Petition is any evidence of compliance with Sup. Ct. R. 14(1)(g)(i), which provides that where a petition for certiorari seeks review of a state court judgment, the statement of the case must contain the following:

> [s]pecification of the stage in the proceedings, both in the court of first instance and in the appellate courts, *when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts;* and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (e.g., court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), *so as to show that federal question was timely and properly raised and that this Court has jurisdiction* to review the judgment on a writ of certiorari.

(Emphasis added.) In fact, Petitioners did not properly raise and preserve the Issue on Appeal before the Michigan appellate courts.

Petitioners never raised the Issue on Appeal before the Michigan Court of Appeals. Nor was the Issue raised in Petitioners' Application for Leave to Appeal to the Michigan Supreme Court. Rather, the first time that Petitioners even arguably raised the Issue was in their Motion for Reconsideration filed after the Michigan Supreme Court denied Petitioners' Application for Leave to Appeal. In light of Petitioners' tardy and last-minute presentation of the Issue in the Michigan court system, which has deprived the Michigan courts of an opportunity to address the Issue in the first instance, the Issue is not properly before this Court.

According to *Cardinale* v. *Louisiana*, 394 U.S. 437, 438, 22 L.Ed.2d 398, 400 89 S. Ct. 116 (1969),

> [I]t was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions . . . The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions. . . . (Citation omitted.)

More recently, this Court stated, in *Webb* v. *Webb*, 451 U.S. 493, 496-497, 68 L.Ed. 2d 392, 397, 101 S. Ct. 1889 (1981), that:

> [i]t is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. (Citations omitted.)

See also *Clark* v. *Jeter*, 486 U.S. 456, 459-460, 100 L.Ed.2d 465, 470-471, 108 S. Ct. 1910 (1988) ("It is our practice, when reviewing decisions by state courts, not to decide federal claims that were not 'pressed or passed upon' below." (Citation omitted.))

In this case, Petitioners' tardy and last-minute presentation of their federal constitutional claim is insufficient to preserve the issue for review by this nation's highest court. Thus, in *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 128, 89 L.Ed. 2092, 2099, 65 S. Ct. 1475 (1945), the Court held:

> Questions first presented to the highest State court on a petition for rehearing come too late for consideration here, unless the State court exerted its jurisdiction in such a way that the case could have been brought here had the questions been raised prior to the original disposition. (Citations omitted.)

See also *Hanson* v. *Denckla*, 357 U.S. 235, 243-244 n.4, 2 L.Ed.2d 1283, 1292, 78 S. Ct. 1228 (1958) (Court refused to consider a constitutional issue which was not raised "until the petition for rehearing in the Florida Supreme Court" since the question "was not seasonably presented to the Florida court"); *Board of Directors of Rotary International, supra*, 481 U.S. 537 at 549-550, 95 L.Ed.2d 474 (1987) (contentions that a California statute was unconstitutionally vague and overbroad "were not properly presented to the state courts," where the appellants "did not present the issues squarely to the state courts until they filed their petition for rehearing with the Court of Appeal.")

In the instant case, the sole issue raised by Petitioners was never presented to the Michigan courts until Petitioners filed their motion for reconsideration in the Michigan Supreme Court. As such, the Issue is not properly before this Court.

II. PETITIONERS' CLAIM THAT THEY WERE DEPRIVED OF THEIR FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AS A RESULT OF THE ALLEGED FAILURE OF THE MICHIGAN COURTS TO CONSIDER PETITIONERS' CONSTITUTIONAL CLAIMS IS WITHOUT MERIT, BECAUSE THE RECORD DOES NOT SUPPORT THAT CLAIM.

As pointed out in the previous section of this Brief, Petitioners' "due process" claim was never presented in a timely fashion to the Michigan appellate courts, and, therefore, is not properly before this Court. Moreover, Petitioners' claim is utterly lacking in merit, and has no factual or legal support. More particularly, and as will be demonstrated in the following subsections of this Brief: (1) the record does not support Petitioners' claim that their state and federal constitutional claims were not considered by the Michigan appellate courts; and (2) even assuming, *arguendo*, that Petitioners' supposed state and federal constitutional claims were not considered on the merits by the Michigan appellate courts, such a refusal was fully justified and did not rise to a violation of Petitioners' Fourteenth Amendment right to due process.

A. Petitioners received adequate consideration of their constitutional claims in the Michigan appellate courts.

Petitioners contend that the Michigan Court of Appeals erroneously failed to consider Petitioners' constitutional claims. The record does not support this contention.

In fact, Petitioners' abandonment of their constitutional claims was addressed in the Court's March 10, 1995 Memorandum Opinion. The Court deemed Petitioners' constitutional claims "abandoned" due to Petitioners'

counsel's statement before the MTT that the "technical arguments" raised in their petition were "not being pursued at this point." The Court stated that it was "not convinced that a miscarriage of justice would occur were we not to rule upon these unpreserved issues."

Thus, contrary to the implications in the Petition, the constitutional issues were in fact briefed and argued in full, and were necessarily reviewed in order for the Court of Appeals to conclude that its holding of "abandonment" would not result in a miscarriage of justice. Moreover, the Court's Opinion can be reasonably read as a simple application of the long-standing rule that determinations on constitutional grounds are disfavored where, as here, a just result can be otherwise reached.

In a related context, the Michigan Supreme Court recently noted: "[a]n appellate court will consider claims of constitutional error for the first time on appeal *when the alleged error could have been decisive of the outcome.*" (Emphasis added.) *Michigan* v. *Grant*, 445 Mich. 535, 520 N.W.2d 123 (1994). Conversely, if the issue is *not* decisive, it need not be addressed.

In this case, the conclusion of the Court of Appeals that a miscarriage of justice would not result if it were not to rule upon Petitioners' constitutional issues indicates that a review of the issues was conducted by the Court, and that the Court concluded that a fair determination of the appeal could be reached without ruling on the constitutional issues. The Court found that the constitutional issues were not outcome-determinative, and that judicial restraint was therefore warranted.

Nor does the record does support Petitioners' claim that the Michigan Supreme Court improperly "refused" to consider Petitioners' supposed state and federal constitutional claims. Here, the Michigan Supreme Court issued

a simple one-sentence order denying Petitioners' Application for Leave to Appeal. This order did not state or imply that the Michigan Supreme Court had refused to consider any of the arguments raised by Petitioners in their Application. Rather, the Michigan Supreme Court, acting within its discretion as a court of limited jurisdiction, simply declined to grant leave to appeal to Petitioners. Such a discretionary denial of leave to appeal can no more be deemed a refusal to consider the arguments made by the applicant than this Court's one-sentence denial of a petition for certiorari can be deemed a refusal to consider the arguments made in a particular petition.

In summary, Petitioners' claim that the Michigan appellate courts refused to consider their constitutional arguments is not supported by the record.

B. Any conclusion by the Michigan appellate courts that Petitioners had not properly preserved their constitutional claims should not be disturbed by this Court.

Petitioners, focusing on the finding of the Michigan Court of Appeals that Petitioners' "constitutional issues" were "abandoned" before the MTT, seem to be arguing that this demonstrates that the Michigan Court of Appeals had refused to consider their constitutional claims. As set forth in Section A, *supra*, that is simply not the case. However, even assuming, *arguendo*, that the Michigan appellate courts did, indeed, refuse to consider Petitioners' supposed constitutional claims because they found that those claims had not been adequately preserved for appeal, those findings should not be disturbed by this Court.

While Petitioners insist that they "are not asking [this] Court to decide a simple question of fact," Petition at 17, it appears that that is exactly what Petitioners are

asking this Court to do. The Michigan Court of Appeals made a factual finding that Petitioners had abandoned certain arguments before a lower tribunal. Petitioners are now asking this Court to revisit that factual finding and to decide it differently.

Actually, Petitioners' failure to preserve their constitutional issues for appellate review constitutes an "adequate state ground" which precludes this Court's review of those issues. According to *Coleman* v. *Thompson*, 501 U.S. 722, 115 L.Ed. 2d 640, 655, 111 S. Ct. 2546 (1991),

> "[t]his Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. This rule applies whether the state law ground is substantive or procedural." (Citations omitted.)

On numerous occasions, this Court has approved a state appellate court's failure to consider federal issues where those issues were not properly presented to the appellate court. For example, in *Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 181 n.3, 76 L.Ed.2d 497, 504, 103 S. Ct. 2296 (1983), this Court, in concluding that it lacked jurisdiction to consider the appellant's federal preemption claim, stated:

> The decision below does not discuss this issue, and when " 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, *unless the aggrieved party in this Court can affirmatively show the contrary.*" (Emphasis added.)

Accord, *Board of Directors of Rotary International, supra*, 481 U.S. 537 at 550, 95 L.Ed.2d 474 at 487. In this case, Petitioners have made no such showing.

Nor should this Court disturb the Michigan courts' rulings concerning Petitioners' failure to comply with the state's rules of practice. See *Herndon* v. *Georgia*, 295 U.S. 441, 443, 79 L.Ed. 1530, 1532, 55 S. Ct. 794 (1935) (Court, after noting that the Georgia Supreme Court had found that the constitutional issues raised by the appellant had not been properly preserved in accordance with "the settled rules of the state practice," held that "this determination of the state court is conclusive here"). See also *John* v. *Paullin*, 231 U.S. 583, 585, 58 L.Ed. 381, 382-383, 34 S. Ct. 178 (1913) (United States Supreme Court upheld Oklahoma Supreme Court's refusal to consider federal issues "because its appellate jurisdiction was not invoked in accordance with the laws of the State.")[1]; *Beck* v. *Washington*, 369 U.S. 541, 552-554, 8 L.Ed.2d 98, 108-109, 82 S. Ct. 955 (1962) (federal constitutional claims which the Washington Supreme Court found had not been properly preserved in accordance with state law).

Under the foregoing authorities, it would be inappropriate for this Court to second-guess the conclusion of the Michigan courts that Petitioners' constitutional claims had not been properly preserved in accordance with the requirements of state procedure.

Finally, Petitioners controvert the Court of Appeals' abandonment finding, illogically seeking to "interpret" the following statement made by Petitioners' attorney before the MTT: "And the technical arguments that we previously raised in our petition are not being pursued at

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[1] The *John* Court noted further: "Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law." (Citations omitted.)

this point." Petitioner's Appendix, p. 36a. In their Statement of the Case, at 4, Petitioners claim that this "statement was intended to dispose of the technical issues raised in counts 1 th[r]ough 3 of Petitioners' Amended Petition" in the MTT. Petitioners' interpretation makes no sense, however, because those counts had been dismissed by the MTT *months before* Petitioners' counsel made that statement. In other words, for this Court (or any other court) to agree with Petitioners' interpretation of that statement, the Court would have to find that the "technical arguments" referenced by Petitioners' counsel were arguments that had already been dismissed. It is certainly not surprising that the Michigan Court of Appeals found this interpretation implausible.

Thus, the sole claim raised by Petitioners in their petition for certiorari is that they have been denied due process by the alleged refusal of the Michigan appellate courts to consider Petitioners' constitutional claims. The above-cited authorities demonstrate that this Court has found, on numerous occasions, that there is no constitutional impediment – under the due process clause or any other provision of the United States Constitution – to a state court's conclusion that certain constitutional issues had not been properly preserved for appellate review. Even if this were, indeed, a case in which the Michigan courts had refused to consider certain issues because they found that the issues had not been adequately preserved, it would still be inappropriate for this Court to disturb that factual finding.

III. PETITIONERS' FEDERAL CONSTITUTIONAL CLAIMS, IF ANY, ARE UNMERITORIOUS.

In litigation stretching over the better part of a decade, Petitioners have been consistently unable to articulate any coherent federal constitutional claims. The

instant Petition suffers from the same deficiency. In short, Petitioners have been unable to articulate the precise nature of the federal constitutional arguments that Petitioners castigate the Michigan appellate courts for failing to consider.

In the following subsections of this Brief, the Township will demonstrate that Petitioners did not properly raise any federal constitutional claims before the Michigan courts. Then, Petitioners will demonstrate that even to the extent that any of Petitioners' papers filed in the Michigan courts can be read to arguably encompass something resembling a federal constitutional claim, any such claims are patently unmeritorious.

A. Petitioners did not properly raise their federal constitutional claims in the Michigan courts.

On numerous occasions, this Court has held that in order to properly present federal constitutional issues for this Court's review on appeal from a state court judgment, the federal constitutional issues must be clearly and unmistakably raised in the lower court proceedings. See *Oxley Stove Co.* v. *Butler County*, 166 U.S. 648, 654-655, 41 L.Ed. 1149, 1151-1152, 17 S. Ct. 709 (1897), in which this Court stated:

> [T]he words "specially set up or claimed" in [28 U.S.C. § 1257] . . . were inserted in order that the revisory power of this court should not extend to rights denied by the final judgment of the highest court of a State, unless the party claiming such rights plainly and distinctly indicated, before the state court disposed of the case, that they were claimed under the Constitution, treaties or statutes of the United States. . . . This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left

> to mere inference. . . . [I]t is not sufficient that it may be inferred argumentatively from the facts stated.

Many other decisions of this Court have reached similar conclusions. See, e.g., *Herndon* v. *Georgia, supra,* 295 U.S. 441 at 442-443, 79 L.Ed. 1530 at 1532 (vague reference that a statute "was in violation 'of the Constitution of the United States' " insufficient to preserve Fourteenth Amendment due process claims); *Ellis* v. *Dickson,* 349 U.S. 458, 460-462, 99 L.Ed. 1231, 1234-1235, 75 S. Ct. 850 (1955) (federal constitutional issues not properly framed by the petitioner's pleadings before the state trial court will not be considered); *Webb, supra,* 451 U.S. 493 at 496-499, 68 L.Ed.2d 392 at 397-398 (Mere reference in trial court to "full faith and credit" was insufficient to preserve a claim under the "full faith and credit" clause of the United States Constitution); *Bankers Life And Casualty Co.* v. *Crenshaw,* 486 U.S. 71, 77, 100 L.Ed.2d 62, 71, 108 S. Ct. 1645 (1988) ("vague appeal to constitutional principles does not preserve appellant's Contract Clause or due process claim. A party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon").

Throughout the state court proceedings in the case, Petitioners made only vague references to any claims asserted under the United States Constitution. While Count V of Petitioners' original complaint contained a reference to the United States Constitution, there was no specific reference to the clause or clauses of the United States Constitution relied upon. Moreover, in Petitioners' Brief on Appeal to the Michigan Court of Appeals and in Petitioners' Application for Leave to Appeal to the Michigan Supreme Court, *there is not a single reference* in the tables of authorities to a single provision of the United States Constitution. As such, it is not surprising if the

Michigan appellate courts had difficulty discerning whether Petitioners had properly presented any federal constitutional claims.

Petitioners rely extensively upon their counsel's opening statement before the MTT. However, that opening statement did not contain a single specific reference to the United States Constitution. Moreover, as this Court held, in *Live Oak Water Users Assoc.* v. *Railroad Commission of California*, 269 U.S. 354, 358-359, 70 L.Ed. 305, 46 S. Ct. 149 (1926), a mere reference to the United States Constitution in oral argument is insufficient to establish that a federal constitutional claim has been properly preserved.

In summary, Petitioners did not adequately preserve any federal constitutional claims in the state court proceedings.

B. Petitioners' federal constitutional claims are unmeritorious.

Even at this late stage in the proceedings, Petitioners have been unable to articulate their alleged federal constitutional claims in a coherent fashion. However, by referencing their closing argument before the MTT, Petitioners seem to be suggesting that their constitutional issues may be discerned through an examination of that closing argument. See PA, pp. 39a-41a, as cited in Petition, p. 6. In that closing argument, however, Petitioners, citing the Equal Protection Clause of the Fourteenth Amendment, merely stated that the Township's creation of a special assessment district failed to utilize "classifications that are based on naturally distinguishing characteristics," and did not apply such classifications in such a fashion "that all members of each classification are treated similarly." Second, Petitioners arguably asserted some type of nebulous claim that their inclusion in the special assessment district constituted a deprivation of

property without just compensation, in violation of the Fifth Amendment to the United States Constitution.[2]

As the Township will demonstrate in the following subsections of this Brief, both of these "constitutional arguments" are based upon defective factual premises and lack legal merit. More specifically, as to the equal protection claim, Petitioners have not established that the Township utilized no standards, or inappropriate standards, in creating the special assessment district. Moreover, the Fifth Amendment "takings" claim, which appears to be based upon the premise that the value of Petitioners' properties was not enhanced in an amount proportionate to the tax levied, is similarly defective, because Petitioners failed to establish such disproportionality in the proofs presented before the MTT. In summary, Petitioners had a full and fair opportunity before the MTT to establish a factual predicate for their constitutional claims, but were unable to do so.

Petitioners are now challenging the factual findings of the MTT, which were affirmed by the Michigan Court of Appeals (which ruled that those findings made were "supported by competent, material, and substantial evidence on the whole record.") PA, p. 2a. The Township submits that such second-guessing of factual findings by

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[2] While their petition is by no means clear on this point, it also seems possible that Petitioners are claiming that two Michigan cases, *Dixon Road Group* v *City of Novi*, 426 Mich. 390, 395 N.W.2d 211 (1986) and *Kadzban* v *Grandville*, 442 Mich. 495, 502 N.W.2d 299 (1993), unconstitutionally require an MTT hearing officer to accord a rebuttable presumption of validity to special assessments. It suffices to say, for purposes of this Brief, that this issue was never properly presented to the MTT. Moreover, Petitioners have never cited any authority in support of the proposition that such a rebuttable presumption violates any provision of the United States Constitution.

a state administrative tribunal would be an inappropriate exercise of this Court's certiorari jurisdiction.

1. Petitioners' equal protection claim is unmeritorious.

Petitioners' apparent claim that the Township failed to adhere to any standard in creating its special assessment district is unsupported by the record. In fact, the appropriate standard can be determined by reference to the nature of the activity and to the legal background for township special assessments for sanitary sewer construction.

MCL 41.721; MSA 5.2770(51) provides that a township has the power to make improvements "and to determine that the whole or any part of the cost of an improvement shall be defrayed by special assessments against property especially benefited by the improvement." MCL 124.287(1)(a); MSA 5.2769(56) provides for the use of special assessments on property benefited by a sewage disposal system, water supply system, or a combination of systems. This is "the commonest exercise of the police power of a State or city." *Renne* v. *Waterford Township*, 73 Mich. App. 685, 690, 252 N.W.2d 842 (1977).[3]

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[3] In *Renne*, the Court of Appeals specifically deferred to the legislative finding that the potential failure of septic fields constituted a risk to health, and upheld the constitutionality of a statute which required properties within 200 feet of a sanitary sewer to be connected to that sewer, even if the property had an operable septic system. The Court held: "[I]t is beyond our province to quarrel with legislative findings on the dangers on septic tanks. . . . If the Legislature chose to nip in the bud a potential for disease transmission rather than to utilize curative measures after the fact, we decline to second-guess its decision." *Renne*, at 695-696.

The unmeritorious nature of Petitioners' claims is demonstrable through an overview of the standards governing judicial review of special assessments and property taxes. The creation of a special assessment district through the legislative powers of a municipality is presumed to be valid, and includes a presumption that the amount of the assessment and the determination of benefits by the municipality is correct and accurate. *Production Tool Supply Co.* v. *City of Roseville*, 74 Mich. App. 34, 37-38, 253 N.W.2d 350 (1977); *Crampton* v. *Royal Oak*, 362 Mich. 503, 514-516, 108 N.W.2d 16 (1961). Moreover, "[o]ne who challenges a special assessment carries a heavy burden of proof, since there is a presumption that the levy is valid." *Konfal* v. *Delhi Township*, 91 Mich. App. 147, 152, 283 N.W.2d 677 (1979). Thus, Petitioners "must at least point out either that the method of assessment adopted was all wrong or that, applying a proper method, a wrong result is apparent." *Kuick* v. *City of Grand Rapids*, 200 Mich. 582, 590, 166 N.W. 979 (1918).

Ultimately, the duty and power to determine the proper method for selecting a criterion for uniform assessments lies with the Township. The assessors are required to make the assessment within the area of the special assessment district according to a definite, uniform, and just plan. *Panfil* v. *City of Detroit*, 246 Mich. 149, 224 N.W. 616 (1929). Once this determination has been made, it carries the presumption of correctness. Its propriety, then, is evaluated by the MTT for a determination of whether the Township applied a wrong principle of valuation. *Meadowlanes Limited Dividend Housing Assoc.* v. *City of Holland*, 437 Mich. 473, 483-485, 473 N.W.2d 636 (1991).

Several formulas have been recognized for determining the allocation of costs within an assessment district. The proper rule depends upon the nature of the benefit

being assessed. See, e.g., *Carmichael* v. *Village of Beverly Hills*, 30 Mich. App. 176, 186 N.W.2d 29 (1971); *Lawrence* v. *City of Grand Rapids*, 166 Mich. 134, 131 N.W. 581 (1911).

Dexter Township carefully considered the benefits to those assessed in contrast to the costs. The preliminary draft of the special assessment district was developed by members of the Township Board, who were directly assisted and advised by professionals with the expertise necessary to develop and apply standards for determining which properties would be benefited. Industry standards were applied in order to determine the rate of flow to be generated per hookup per day. (Tr. VI, p. 1399) Prior to the development of the preliminary assessment roll, many different criteria were weighed by the Board members. (Drollett Depo Tr. p. 10; Eisenbeiser Depo Tr. p. 23-24)

Petitioners contend that the Township erred in its ultimate decision to allocate the same burden to each unit of duplexes within the district as it did to detached, single family homes. However, the allocation was factually sound, with the "per tap" charge based upon the fact that, in developed areas like Portage Lake (which will not be expanding outward), each dwelling unit contributes the same amount of wastewater to the treatment facility, and therefore receives the same benefit, regardless of whether they are free-standing or attached. (Tr. III, p. 597)[4]

Although no Michigan case specifically addresses whether a special assessment may treat individual dwelling units as the appropriate measure for apportioning a

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[4] Township Supervisor Jim Drollett was advised by bond counsel that special assessments for sewer systems, as opposed to road construction, ordinarily provided for each dwelling unit to receive a tap, and, therefore, for each unit to be assessed. (Tr. VI, p. 1425-1426, 1430)

sanitary sewer special assessment, several closely analogous situations have very recently been addressed by the Michigan courts. Those cases validate the Township's approach from a legal standpoint.

Thus, in *Brittany Park Apartments* v. *Harrison Charter Township*, 432 Mich. 798, 433 N.W.2d 161 (1989), a water and sewer rate-making case, apartment owners challenged the constitutionality of the Township's water and sewage rate-making formula (which was based upon a "per dwelling unit" charge very similar to that applied in the present case). As in this case, the plaintiffs sought to be charged for water and sewer service only by reference to the number of building structures, rather than the number of households within each structure.

The Michigan Supreme Court began its analysis with the statement that the Township had the right to impose classifications upon the users of its services so long as the classification was rationally related to a legitimate state interest, and as long as all persons within the class were treated alike. The Court emphasized that the burden remains upon the challenging party to show that the classification is "discriminatory and arbitrary" and without reasonable justification. *Id.* at 804. The Court further emphasized the advantages characteristically inuring to apartment owners from economies of scale, and concluded that the plaintiffs were simply seeking to increase their existing advantages by lowering their water and sewer rates below those paid by single-family homes. *Id.* at 810. The Court held that, although some disparity existed between the ultimate payment made per structure, the per dwelling unit formula was rational and reasonable, and the goal of uniformity was clearly met.

Similarly, in *3333 Moore's River Drive Assoc.* v. *City of Lansing*, 143 Mich. App. 253, 372 N.W.2d 523 (1985), the Court held that each condominium unit was required to

be valued separately for property tax purposes. Although *Moore's* dealt with property taxes, rather than special assessments, it thus confirmed the validity of the principle that the number of dwelling units within a structure, rather than the structure itself, is an appropriate unit of measurement for an assessment.[5]

In the present case, Petitioners failed to demonstrate any irrational classification. No evidence whatsoever was offered indicating that the amount of wastewater discharged from the individual units within each duplex

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[5] Similarly, in *City of Novi* v. *City of Detroit*, 433 Mich. 414, 446 N.W.2d 118 (1989), a challenge to water and sewage ratemaking, the Michigan Supreme Court addressed the propriety of the per dwelling unit standard for allocating water and sewer rates, deferring to the legislative judgment of the municipalities, and stating that it was "ill-equipped to deal with the complex, technical processes required to evaluate the various cost factors and various methods of weighing those factors. . . . " *Id.* at 430. The Court stated that, although a municipality is statutorily limited to charging for water and sewer "at a rate which is based on the actual cost of service," the Legislature's use of that phrase cannot be construed to mean "exactly equal the actual cost of service, in light of the difficulties inherent in the rate-making process and the statutory and practical limitations on the scope of judicial review." *Id.* at 431. The Court repeatedly acknowledged the complexity in calculating a uniform allocation of costs across populations using a given facility, the necessity of factoring in "pragmatic adjustments," and the widely accepted premise that, due to the complexities of each situation, a municipality need not be bound to any one particular formula. *Id.* at 428-429. And, crucially, the Court confirmed that the plaintiff bears the burden of proving that the rates charged are not rationally related to the services provided, and may not merely rest upon a claim that the water rates do not reflect actual mathematical costs. *Id.* at 432.

would tend to be characteristically less than would be discharged from detached homes.[6]

In summary, the record does not support Petitioners' claim that the Township applied no standard in creating the special assessment district, or that the standard employed was so unreasonable as to constitute a violation of the Equal Protection Clause.

2. Petitioners' takings claim is unmeritorious.

Petitioners' Fifth Amendment takings claim seems to be based on the premise that although they are being taxed at a rate of $7,000.00 per unit as a result of their inclusion in the special assessment district, their property values are not being enhanced in a proportionate amount as a result of the sewer construction.

Once again, the record does not support Petitioners' position, as the MTT found that "the installation of a sanitary sewer will increase property values generally (according to the Schuur analysis an average of $7000 per unit) and is probably applicable to the duplexes as well."[7] The Michigan Court of Appeals held that this finding was supported by competent, material, and substantial evidence.

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[6] Ultimately, the adopted classification is rational, based upon the type of use and occupancy, i.e., residential, as opposed to commercial, office, or industrial use. The Township and the Water and Sewer Authority have adopted separate usage rules, different rates, and a method for determining the "equivalence" between residential and commercial-industrial properties. Each residential unit, whether detached or not, can reasonably be anticipated to produce a certain relatively equivalent amount of wastewater requiring treatment. (Tr. I, pp. 82-83)

[7] In point of fact, Mr. Schuur's detailed findings supported market increases well above $7,000.00 per dwelling unit.

Substantial evidence was presented showing special tangible, and intangible, benefits to Petitioners' properties as a result of the new sewer system.[8]

Petitioners, in fact, have *conceded* that the sewer system was a "desperately needed benefit." (Petitioners' Brief on Appeal to Michigan Court of Appeals, p. 48.) In short, the septic systems were contributing to severe contamination and detriment to the health and welfare of the people and environs surrounding Portage and Base Lakes. A sewer system will provide substantial benefits, including the intangible benefits which may properly be considered as factors in determining whether and to what extent a property's value has been enhanced. The only issue raised by Petitioners is the *degree* of benefit versus cost.

"It is the Tax Tribunal's duty to determine which approaches [of determining fair market value] are useful

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[8] See, e.g., Tr. VI, p. 1343 (no future need to replace or restore septic fields); Tr. VI, p. 1345 (improved quality of lakes and neighborhoods generally). Additional benefits include the following: (1) a discontinuation of the contamination of Petitioners' subsoils and groundwater by urine, nitrates, and other pollutants as a result of the improved sewage disposal of the surrounding properties (Tr. I, p. 60); (2) easier financing for improvements (Tr. V, p. 1165); (3) prevention of the flow of effluent from the residents on higher ground into the wells of the residents below (Tr. VI, pp. 1348-1349); (4) diminution of the nitrate level of waters released into the environment to the levels required by the Michigan Department of Natural Resources; (5) greater control of the discharge of hazardous wastes, toxins, and oils into the environment; (6) gradual removal of the phosphorous from the area soils; (7) elimination of the odors which frequently attend the use of septic fields; and (8) lower long-term maintenance and repair cost than individual septic fields. (Tr. VI, pp. 1353-1357, 1386-1388).

in providing the most accurate valuation under individual circumstances of each case." *Meadowlanes, supra.* In *Meadowlanes,* the Michigan Supreme Court evaluated the valuation method adopted by the MTT and the Michigan Court of Appeals in appraising taxable property. The Court addressed whether the MTT had erred when it adopted a limited valuation approach.

> "There are three traditional methods of determining true cash value, or fair market value, which have been found acceptable and reliable by the Tax Tribunal and the courts. They are: (1) the cost-less-depreciation approach, (2) the sales-comparison or market approach, and (3) the capitalization of income approach . . . All three approaches should be used whenever possible, and an appraisal which disregards an approach by mere statements and without research justifying nonuse is considered incomplete. The values derived under the various approaches are correlated, reconciled, and weighed in order to reach a final estimate of value." *Meadowlanes, supra,* at 484-486. (Citations omitted)

Other than lay testimony, the only evidence of valuation presented by Petitioners came from real estate appraiser Henrik Schuur. For the detached homes, Schuur applied the above-described "triadic" method and received a result acceptable to the parties and to the MTT. Schuur did not apply the same methods of analysis to the duplexes but, instead, produced an analysis based only on the discounted cash flow income approach, contrary to the standards set forth by the Michigan Supreme Court. (Tr. VII, pp. 1449-1593). The MTT rejected Mr. Schuur's testimony and exhibits as to the duplexes as so "incomplete" by established professional standards that it was neither reliable nor credible. Petitioners have not come

forward with a single credible reason why this factual finding should be disturbed by this Court.

Petitioners introduced no reliable evidence to overcome the presumptions of validity as to the value of the special benefit which they received as to their properties, nor as to the amount levied.

> "As noted above, special assessments are presumed to be valid. Thus, to effectively challenge special assessments, plaintiffs, at a minimum, must present credible evidence to rebut the presumption that the assessments are valid. Without such evidence, a tax tribunal has no basis to strike down special assessments. (citations omitted) In this case, the hearing officer found that the presumption had not been rebutted . . . On this basis alone, the decision of the Tax Tribunal was correct and should be upheld." *Kadzban* v. *City of Grandville*, 442, Mich. 495, 505, 502 N.W.2d 299 (1993).

In the present case, as in *Kadzban*, the property owners failed to present reliable evidence sufficient to rebut the presumption of the validity of the special assessment. As such, Petitioners' takings claim is unsupported by the record.

CONCLUSION

For all of the foregoing reasons, the Township respectfully requests this Honorable Court to deny Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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(3)

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No. 96-438

SUPREME COURT OF THE UNITED STATES

October Term, 1996

Joseph P. Boltach, Petitioner
v
Dexter Township, Respondent

Abraham V. Williams, Jr., Petitioner
v
Dexter Township, Respondent

On Petition for a Writ of Certiorari to the
Michigan Court of Appeals

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does this court have jurisdiction over Petitioners' claim because it was presented when the issue first arose and has been the primary focus of Petitioners' writings since then?

2. Can there ever be an adequate state law ground for refusing to satisfy federal due process requirements?

3. Will Respondent say almost anything to avoid judicial scrutiny of its illegal assessment?

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1. THIS COURT HAS JURISDICTION OVER PETITIONERS' CLAIM BECAUSE IT WAS PRESENTED WHEN THE ISSUE FIRST AROSE AND HAS BEEN THE PRIMARY FOCUS OF PETITIONERS' WRITINGS SINCE THEN.

On April 18, 1989, Respondent Dexter Township adopted an administrative special assessment resolution, Special Assessment Resolution #3 (SAR 3). On May 18, 1989, owners of 18 properties filed petitions in the Michigan Tax Tribunal (MTT) listing several reasons to believe that SAR 3 is unconstitutional and *ultra vires*. Appendix to Application For Writ Of Certiorari (PA) , pp 22a - 35a.

Petitioners asked the MTT to determine whether SAR 3 is authorized by law and supported by evidence. Petitioners' Closing Argument, pp 7 - 9, Const 1963, art 6, § 28, **Marbury** v **Madison**, 5 US (Cranch) 137; 2 LEd 60 (1803), **Alan** v **Wayne Cty**, 388 Mich 210; 200 NW2d 628, 675, 676 (1972). Petitioners

were aware that the Michigan Tax Tribunal Act states:

> "A proceeding before the tribunal shall be original and independent and shall be considered de novo." MCL § 205.735 (1), **Alhi Development Co** v **Orion Twp**, 110 Mich App 764; 314 NW2d 479, 481 (1981).

On the other hand, Respondent asked the MTT to apply an obsolete common law standard of review that begins with an illegal bias. Respondent's Post Hearing Brief, pp 51 - 53.

After the proofs were closed, Respondent asked the MTT to give the standard of review an issue precluding effect. Respondent's Post Hearing Brief, pp 63 - 64. As Respondent requested, the MTT hearing officer decided it could not review claims of fraud, mistake, or abuse of discretion unless Petitioners' economic harm was 2.6 or more times greater than the economic benefit, if any, received via the project. PA p 13a, 16a.

The dollar amount of economic harm and economic benefit are questions of fact which the MTT is required to answer on the basis of evidence. **Dixon Road Group** v **City of Novi**, 426 Mich 390; 395 NW2d 211 (1986) (after

remand for findings of fact), **Kadzban** v **City of Grandville**, 442 Mich 458; 502 NW2d 299 (1993). The Michigan Tax Tribunal Act requires the hearing officer to place findings of fact in an appropriately labeled section of the proposed order and to indicate what evidence, if any, supports those findings. MCL 205.751(1). **Antisdale** v **City of Galesburg**, 420 Mich 265, 277; 362 NW2d 632 (1984).

The hearing officer did not determine economic burden, nor economic benefit, nor the mathematical difference between the two. PA pp 3a - 9a. Instead, the hearing officer presented only a conclusion, which he placed in the "Conclusions of Law" section of the order. PA pp 14a, 15a. Having "concluded" that the presumption was not overcome, the hearing officer affirmed the assessment without analysis of Petitioners' claims of error. PA p 16a.

Ever since then, Petitioners have been dealing with two separate but related federal constitutional claims. The first claim is that SAR 3 violates the due process, equal protection and just compensation clauses of both federal and state constitutions. The second claim is that Petitioners have a federal and state constitutional

right to an unbiased judicial review of each issue necessary to properly decide the first claim. It is this second claim that brings Petitioners to the United States Supreme Court.

In its reply to the Petitioners' application for a writ, Respondent claims that the question presented to the United States Supreme Court was not presented for the first time until after the Michigan Supreme Court denied Petitioners' Application for leave to appeal. Reply, p 10. That statement is false.

Petitioners first raised the issue in their objections to entry of the Michigan Tax Tribunal's proposed judgment. Petitioners not only informed the full tribunal that the hearing officer applied an obsolete standard of review but explained the fundamental federal and state constitutional principles that are codified in the required standard of review. That explanation was then converted to issue number one on Petitioners' appeal of the full tribunal's order. PA p 43a. That explanation was the primary focus of Respondent's unsuccessful motion to affirm. PA p 45a. That explanation was issue number one on Petitioners' application for leave to appeal and on Petitioners' motion for reconsideration. PA pp 47a, 48a.

Of course, the issue was not stated in the exact same words as are found in Petitioners' application, since each court's failure to obey the law changed the circumstances under which the issue arose. No two courts relied on the same excuse for refusing to review the validity of the unconstitutional assessment.

In Supreme Court Practice, 7th ed, p 118, we are instructed as follows:

> "In framing the federal question for presentation to the state court, the litigant is not bound to follow any particular form of words or phrases. It is essential only that he bring the federal claim and the grounds therefor to the state court's attention with fair precision. And 'if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.' **New York ex rel Bryant** v **Zimmerman**, 278 US 63, 67 (1928)."

The "record as a whole" contains repeated references to federal and state cases explaining the federal principles of due process that

Michigan's standard of review requirement is designed to protect.

Petitioners' claims of error relating to the underlying assessment involve questions of fundamental federal law. PA pp 39a - 41a. However, it is not necessary for Petitioners to prove that the case in chief also raises substantial federal questions when jurisdiction is based on Petitioners' federally protected right to a judicial review of those claims.

Because Petitioners have repeatedly presented Michigan courts with a claim that they have an unsatisfied federal and state due process right to a judicial review of each claim of error, the United States Supreme Court has jurisdiction over the question presented in Petitioners' application for a writ. 28 USC § 1257.

2. THERE IS NO ADEQUATE STATE LAW GROUND FOR REFUSING TO SATISFY FEDERAL DUE PROCESS REQUIREMENTS.

As required by US Const, art VI § 2, Michigan's due process guarantee is no less stringent than the federal due process

guarantee. The Fifth Amendment and Michigan's counterpart, Article 1 § 17 use the same words:

> "No person shall .. be deprived of life, liberty, or property, without due process of law...".

Not surprisingly then, Michigan due process cases rely upon federal cases and federal hornbooks for interpretation of Michigan's due process clause. See **Alan** v **Wayne County**, 388 Mich 210; 200 NW2d 628 (1972) for example.

Therefore, if a Michigan court decides that a particular act does not violate the Michigan due process clause when the act does violate the federal due process clause, the decision is erroneous under Michigan law. Const 1963, art 1, § 17, art 6, § 28. US Const, Art VI, § 2, US Const, AM V, XIV.

Decisions that are erroneous under state law are not based on "adequate" state law grounds. As indicated in Petitioners' application, state decisions that violate federal law are not based on "adequate" state law grounds either. US Const, Art VI, § 2, US Const, AM V, XIV.

3. RESPONDENT WILL SAY ALMOST ANYTHING TO AVOID JUDICIAL SCRUTINY OF ITS ASSESSMENT.

Respondent misrepresents the law applicable to the unreviewed issues. For example, Respondent attempts to lure this Honorable Court into thinking that rate making common law controls its decision to use a flat rate assessment, even though the issue is actually controlled by special assessment law. MCL § 123.753, MCL § 41.725, MCL § 124.287. Due to the federal constitutional principles of due process, equal protection and just compensation, Michigan special assessment statutes prohibit a flat rate assessment when the value of the benefit varies. **Crampton** v **Royal Oak**, 362 Mich 503; 108 NW2d 16 (1961). Respondent cannot win this issue if it tells the truth.

Previously, Respondent told the Michigan Court of Appeals that its order was "not clear" on what "issues were waived". Response to Motion for Rehearing, pp 6 - 7. It also told the court that "abandonment" is the wrong reason to ignore the issues, while "abstention" might work if the Court clarifies its order. Response, p 9. The court did

not acknowledge either suggestion. PA p 19a. Respondent now claims that the Michigan Court of Appeals avoided Petitioners' claims on the basis of the abstention doctrine. Reply p 12. Respondent does so to hide the fact that the Michigan Court of Appeals has no explanation nor excuse for not reviewing Petitioners' claim that the MTT applied the wrong standard of review to whatever issues were at issue during the six day hearing.

How much of Respondent's "Counter - Statement of the case" was relevant to the arguments presented in its reply? Isn't it mostly argument, rather than statement? There are few citations to record evidence and a few citations to material outside the record. Respondent does not want this case decided on the applicable law and evidence. Therefore, it will not present a fair and accurate representation of either law or fact.

In short, Respondent's reply is a great example of the type of tactic FRCP Rule 11 was designed to prevent. See also SCR Rule 8.

At the same time, Respondent's arguments raise many questions of law and fact about the validity of the assessment. The answers to those issues do not appear in any

lower court order because Respondent has consistently gone to extremes to avoid having the questions answered. Respondent's tactic has worked because of Michigan's willingness to avoid enforcement of clearly established, federally protected rights, not only in this case, but as an increasingly general rule.

A huge percentage of eligible voters did not vote in November 1996. The longer states avoid their duty to protect citizens from perhaps well meaning but unwarranted illegal government acts, the more reason there is for citizens to not trust any branch of government, and to believe that voting won't matter. Whether or not a candidate is for or against a particular legislative idea won't much matter as long as the courts permit local governments to declare that the law is "irrelevant".

Respectfully Submitted,

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